Feb 10 1871
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~441.~~ 210

EMIL STEINBACH, PLAINTIFF IN ERROR,

vs.

CHARLES V. STEWART, GEORGE W. WHITMAN, MARTHA C. WATRISS, AND JACOB B. WARFIELD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED APRIL 7, 1870.

Feb 11 1871
Argument
for Plaintiff

16

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No. 441.

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A UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between Emil Steinbach, as plaintiff, and Charles V. Stewart, George W. Whitman, Martha C. Watris, and Jacob B. Warfield, as defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Ssupreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of April, A. D. 1868, and of the independence of the United States the ninety-third.

[SEAL.] Attest: GEO. E. WHITNEY,
Clerk of the Circuit Court of the U. S. for the District of California.

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

The return to the within writ appears by the schedule annexed.
By the court.

[SEAL.] Attest: GEO. E. WHITNEY, *Clerk.*

(Indorsed:) United States Supreme Court. Emil Steinbach, plaintiff in error, vs. Charles V. Stewart & al. Writ of error. Due, $2 50.

1

Complaint.

In the circuit court of the United States for the districts of California in and for the northern district.

EMIL STEINBACH
vs.
CHARLES V. STEWART, JOHN SIMMONS, HENRY Guerne, George Guerne, Henrietta Guerne, Jacob B. Warfield, William F. Franklin, Charles Justi, John Doe Watriss and Martha C. Watriss, his wife, John Gibson, John Kron, Joseph A. Williams, John Doe Whitman, Jacob Underhill, John Smith, Daniel Weingarten, John Doe Ackerman, whose true first name is to plaintiff unknown, Christian Wise,

Louis Wall, Hugh Nun, James Hamilton, John Bowen, Casper Shuster, John Doe Whitman, Richard Roe Whitman, the true first names of which two persons last named are to the plaintiff unknown, and Jihon Schmidd and Voe Leef, whose real names are to plaintiff unknown, Johannes Smithers, Hans Schmidt, Jean Smeets, Ivan Schmitteweiski, and Ton Qa Smittia, defendants.

2 Emil Steinbach, who is a subject of Johann, King of Saxony, plaintiff, by Brooks & Whitney, his attorneys, complains of Charles V. Stewart, John Simmons, Henry Guerne, George Guerne, Henrietta Guerne, Jacob B. Warfield, William F. Franklin, Charles Justi, John Doe Watriss and Martha C. Watriss, his wife, John Gibson, John Kron, Joseph A. Williams, Jacob Underhill, John Doe Whitman, Daniel Wingarten, John Doe Ackerman, whose true first name is to plaintiff unknown, Christian Wise, Louis Wall, Hugh Nun, James Hamilton, John Bowen, Casper Shuster, John Doe Whitman, Richard Roe Whitman, the two first names of which two persons last named are to the plaintiff unknown, and Jihon Schmidd and Voe. Leef, whose real names are to plaintiff unknown, John Smith, Johannes Smithers, Hans Schmidt, Jean Smeets, Ivan Schmittiweiski, and Ton Qa Smittia, defendants, and for cause of action alleges that, on the 5th day of February, 1864, the said plaintiff was, and ever since has been and now is owner in fee-simple absolute, and entitled to the possession of that certain piece or parcel of land situated, lying, and being in the county of Sonoma, and within the

3 northern district of California, known as the Rancho Agua Caliente, and bounded and described as follows: On the southwest by the creek formerly known as the creek of the Rancho of Petaluma, and now known as Sonoma Creek; on the southeast by the former pueblo, now city of Sonoma; on the north by the tops of the hills intermediate of and dividing it from the rancho of Jorge Yount; and on the northwest by the rancho and creek of Los Guillicos. That while the plaintiff was so the owner, and entitled to the possession of said land and premises, the defendant did, on the day and year aforesaid, unlawfully, and without right or title thereto, enter into and upon the same, and oust the plaintiff therefrom, and from thence withheld, and now wrongfully and unlawfully possess and occupy the same, and withhold possession thereof from the plaintiff.

And for a further and separate cause of action the plaintiff alleges that, on the 5th day of February, 1864, the said defendants unlawfully and wrongfully entered upon and expelled and amoved the plaintiff from the premises hereinbefore described, and from thence hitherto have kept him so wrongfully expelled and amoved, of which premises the plaintiff

4 was then, and ever since has been, the owner, and entitled to the possession, and during all that time the defendants took and had and received to the use of them, the said defendants, all the rents, issues, and profits of the said premises, which are of great monthly value, to wit, of the monthly value of one thousand dollars; whereby the plaintiff, during all the time aforesaid, and hitherto, not only lost the issues and profits of the premises, with the appurtenances, but was deprived of the use and means of cultivating the same, to the damage of the plaintiff fifty thousand dollars.

And the plaintiff further says that the names John Doe Whitman and John Doe Watriss, and the last six names of the defendants above men-

tioned and enumerated are fictitious names, intended to designate persons whose real names are unknown to plaintiff.

Wherefore the plaintiff brings this suit, and prays that he may have and recover from the said defendants the said real estate, and the possession thereof, and his damages aforesaid for withholding thereof as aforesaid, to the sum of fifty thousand dollars, besides his costs in this behalf expended.

And he further prays that when the real names of the persons
5 who are hereinabove designated by fictitious names may be ascertained, the same may be inserted in this complaint.

San Francisco, 30 April, 1864.

BROOKS & WHITNEY,
Att'ys for Plaintiff.

B. S. BROOKS, *of Counsel.*

Endorsed: Filed April 30th, 1864.

HENRY C. HYDE, *Clerk.*

6 *Amended summons.*

United States of America, in the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH, PLAINTIFF,
vs.
CHARLES V. STEWART ET AL., DEFENDANTS.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting, to Charles V. Stewart, John Simmons, Henry Guerne, George Guerne, Henrietta Guerne, Jacob B. Warfield, William F. Franklin, Charles Justi, John Doe Watriss, and Martha C. Watriss, his wife, John Gibson, John Kron, Joseph A. Williams, John Doe Whitman, Jacob Underhill, Daniel Weingarten, John Doe Ackerman, Christian Wise, Louis Wall, Hugh Nun, James Hamilton, John Bowen, Casper Shuster, Jane Doe Whitman, Richard Roe Whitman, Jihon Schmidd, Voe Leef, John Smith, Johannes Smithers, Hans Schmidt, Jean Smeets, Ivan Schmittiweiski, and Ton Qa Smittia, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States
7 for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a copy of which accompanies this summons) in the office of the clerk of said court in the city and county of San Francisco, within ten days (exclusive of Sundays and day of service) after the service on you of this summons, if served in this county, or, if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover the possession of a certain tract of land known as the Rancho Agua Caliente, situate in the county of Sonoma, northern district of California, together with fifty thousand dollars damages, and costs of suit, all of which is more particularly set forth in said complaint; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, this 31st day of May, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

[SEAL.] Attest: HENRY C. HYDE, *Clerk.*

[50-cent. U. S. rev. stamp canceled]

8 U. S. MARSHAL'S OFFICE,
Northern District of California:

At the request of the plaintiff, and on being satisfied that it is expedient, I hereby especially deputize John L. Green, a discreet person, and of suitable age, and not interested in the action, to serve and return the within writ.

San Francisco, June 12th, 1864.

CHARLES W. RAND,
U. S. Marshal for the Northern District of California.

9 *Affidavit of service of summons.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH, PLAINTIFF,
vs.
CHARLES V. STEWART ET ALS., DEFENDANTS.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

John L. Green, being duly sworn, says that he is a white male citizen of the United States, and that he was, on the twenty-third day of May, A. D. 1864, and a long time previous thereto, upwards of the age of twenty-one years, and competent to be a witness on the trial of this action; that on the twenty-third day of May, A. D. 1864, at the county of Sonoma, affiant served the complaint and summons in the above-entitled action upon Joseph A. Williams, John Simmons, Jacob B. Warfield, William F. Franklin, Lucy Box, who was sued as Voe Leef, Herman F. Brockman, sued as John Smith, Joseph E. Brockman, sued as Hans Schmitt, Thomas Non, sued as Jean Smeets, Caspar Shuster, Alexander Dunbar, sued as Jean Schmittiweski, C. A. Johnson, sued as
10 Ton Qa Smittia, George Guerne, Charles Justi, John Gibson, John Kron, Nancy A. Whitman, sued as John Doe Whitman, George E. Watrous, sued as John Doe Watross, and Martha C. Watrous, by delivering to each of them, personally, and leaving with each of them, a copy of the summons attached to a certified copy of the complaint in this action.

And affiant further says that on the twenty-fourth day of May, A. D. 1864, at the city and county of San Francisco, affiant served the summons in said cause upon Henrietta Guerne by delivering to her personally and leaving with her a copy thereof attached to a certified copy of the complaint in this action; that on the 25th day of May, A. D. 1864, at said city and county of San Francisco, affiant served the summons in said cause upon Charles V. Stewart by delivering to him personally and leaving with him a copy thereof attached to a certified copy of the complaint in this action; that on the seventh day of June, A. D. 1864, at said city and county of San Francisco, affiant served the summons in said cause upon Louis Guerne by delivering to him personally and leaving with him a copy thereof attached to a certified copy of the complaint

in this action; that on the 15th day of June, A. D. 1864, at the county of Sonoma, affiant served the amended summons in the above-entitled cause upon H. H. Whitman, who was sued as John Doe Whit-
11 man, Daniel Weingarten, Chris. Ackerman, who was sued as John Doe Ackerman, Christian Wise, Louis Wall, and Hugh Nun, by delivering to each of them personally, and leaving with each of them, a copy thereof attached to a certified copy of the complaint in this action.

And affiant further says that at the time he made the service as aforesaid he exhibited to each of the defendants so served the original summons in the above-entitled cause.

And affiant further says that he knows the persons so served by him to be the Joseph A. Williams, John Simmons, Jacob B. Warfield, William F. Franklin, Lucy Box, Herman F. Brockman, Joseph E. Brockman, Thomas Non, Caspar Shuster, Alexander Dunbar, C. A. Johnson, George Guerne, Charles Justi, John Gibson, John Krow, Nancy Ann Whitman, George E. Watriss, Martha E. Watriss, Henrietta Guerne, Charles V. Stewart, Louis Guerne, H. H. Whitman, Daniel Weingarten, Christian Wise, Louis Wall, Hugh Nun, mentioned and intended in said complaint and summons.

JOHN L. GREEN.

Sworn this 25th day of July, A. D. 1865, before me.

W. O. ANDREWS,
Notary Public.

12 *Default.*

U. S. circuit court, nor. dist. of Cal'a.

EMILE STEINBACK
vs.
CHA'S V. STEWART ET ALS.

UNITED STATES OF AMERICA,
Northern dist. of California, ss:

In the above-entitled cause the following-named defendants, having been duly served with process as follows, to wit, Chris. Ackerman, (sued as John Doe Ackerman,) Christian Wise and Hugh Nun, on the 15th day of June, 1864, and John Simmons, and Herman F. Brockman, (sued as John Smith,) on the 23d day of May, 1864, as appears by the affidavit attached to the original summons filed herein; and the legal delay for answering having expired as to said defendants, and said defendants having failed to plead, answer, or demur as required by said summons, now, on application of plaintiff's attorneys, to wit, Messrs. Brooks & Whitney, esq's, the defaults of said above-named defendants are hereby entered.

San Francisco, July 28th, A. D. 1865.

GEO. C. GORHAM, *Clk*,
By W. F. HUESTIS, *Dep. Clerk.*

Endorsed: Filed July 28th, 1865.

GEO. C. GORHAM, *Clerk*,
By HUESTIS, *Dep. Clk.*

13 *Answer—J. E. Brockman.*

U. S. circuit court, northern dist. of California.

E. STEINBACK
vs.
CHARLES V. STEWART ET AL.

Joseph E. Brockman, one of the defendants in the above-entitled cause, comes, and, for answer to the plaintiff's complaint filed herein, says that he denies, specifically, each and every allegation in plaintiff's complaint mentioned and set forth.

Wherefore defendant prays judgment in his favor, for his costs, &c.

J. J. PAPY,
Att'y for Def't.

Endorsed: Filed June 3d, 1864.

HENRY C. HYDE, *Clerk.*

Service of copy accepted this 3d day of June, 1864.

BROOKS & WHITNEY,
Att'y for Pl'ff.

14 *Answer of Lucy Box.*

U. S. circuit court, northern dist. of California.

E. STEINBACK
vs.
CHARLES V. STEWART ET ALS.

Lucy Box, one of the defendants in the above-entitled cause, comes, and, for answer to the plaintiff's complaint filed herein, denies, specifically, each and every allegation in the plaintiff's complaint mentioned and set forth.

Wherefore defendant prays judgment in her favor, for her costs, &c.

J. J. PAPY,
Att'y for Def't.

Endorsed: Filed June 3d, 1864.

HENRY C. HYDE, *Clerk.*

Service of copy accepted this 3d day of June, 1864.

BROOKS & WHITNEY,
Att'y for Pl'ff.

15 *Answer of C. A. Johnson.*

U. S. circuit court, northern dist. of California.

E. STEINBACK
vs.
CHARLES V. STEWART ET ALS.

Clem A. Johnson, one of the defendants in the above-entitled cause, comes, and, for answer to plaintiff's complaint filed herein, denies, specifically, each and every allegation in plaintiff's complaint mentioned and set forth.

Wherefore defendant prays for judgment in his favor, for his costs, &c.

J. J. PAPY,
Att'ys for Def't.

Endorsed: Filed June 3d, 1864.

HENRY C. HYDE, *Clerk.*

Service of copy accepted this 3d day of June, 1864.

BROOKS & WHITNEY,
Att'ys for Pl'ff.

16 *Answer of Alex. Dunbar.*

U. S. circuit court, northern dist. of California.

E. STEINBACK
vs.
CHARLES V. STEWART ET ALS.

Alexander Dunbar, one of the defendants in the above cause, comes, and, for answer to the plaintiff's complaint filed herein, denies, specifically, each and every allegation in plaintiff's complaint mentioned and set forth.

Wherefore defendant prays judgment in his favor, for his costs, &c.

J. J. PAPY,
Att'y for Def't.

Endorsed: Filed June 3d, 1864.

HENRY C. HYDE, *Clerk.*

Service of copy accepted this 3d day of June, 1864.

BROOKS & WHITNEY,
Att'ys for Pl'ff.

17 *Answer—Henry Guerne & al.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH, PL'FF,
vs.
CHARLES V. STUART ET ALS., DEF'TS.

And now comes Henry Guerne, George Guerne, Henrietta Guerne, Whitman, (sued as Jane Doe Whitman,) Henry Whitman, (sued as Richard Roe Whitman,) Lewis Wall, (sued by a fictitious name,) Thomas Now, (sued by a fictitious name,) and Casper Shuster, defendants in the above-entitled action, and, for answer to the complaint filed therein, deny each and every allegation in said complaint contained.

Wherefore these defendants ask that plaintiff take nothing by reason of his said action, and that these defendants have judgment for their costs.

E. D. WHEELER &
EUGENE LIES,
Attorneys for Def't's.

Due service of a copy of the within answer is admitted this 30th day of August, 1864.

GEO. C. GORHAM, *Clk,*
P'r W. F. HUESTIS, *D. C.*

18 *Answer—Geo. E. Watriss.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH, PL'FF,
vs.
C. V. STEUART ET ALS., DEF'TS.

And now comes Geo. E. Watriss, (sued as John Doe Watriss,) one of the defendants in the above-entitled action, and, for his separate answer to the complaint herein, denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that he is in the joint possession and occupancy with the defendant, Martha C. Watriss, his wife, of the tract of land described in the separate answer of said Martha; but avers that said Martha is the owner in fee of said tract, and that the same is her separate property, and that she is entitled to the possession of the same.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinbefore mentioned and described in the separate answer of Martha

19 C. Watriss, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action.

And defendant further avers that he and those under whom he holds and derives title, now are, and have been, in the exclusive possession of said premises adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Att'ys for Def't, George Watriss.

Due service of a copy of within answer admitted Sept'r 9, 1864.
BROOKS & WHITNEY,
Att'ys for Pl'ff.

Endorsed: Filed Sept. 9, 1864.
GEO. C. GORHAM, *Clerk*,
By W. F. HEUSTIS, *D. C.*

20 *Answer of Charles Justi.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS., DEFENDANT.

And now comes Charles Justi, one of the defendants above named,

by E. D. Wheeler and Eugene Lies, his attorneys, and, for his separate answer to the complaint in the above-entitled action, denies each and every allegation in said complaint contained, except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendants admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows: Beginning at the upper corner, on Sonoma Creek, of the piece of land sold by Hoepner and wife to Beasley and Cooper; thence northerly with Beasley and Cooper's line to the Santa Rosa road; thence along said road in an easterly direction about one mile, and thence to Sonoma Creek, so as to include five hundred and forty and one-half acres of land, being the same land purchased by Charles Gerl and another of one A. Hoepner.

21 And this defendant avers that he is the owner in fee, and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, for the period of eleven years last past, and that during said period this defendant has made permanent improvements thereon to the value of, at least, the sum of two thousand dollars.

And for further and seperate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action. And defendant further avers that he, and those under whom he holds and derives title, now are, and have been, in the exclusive possession of said premises adversely to plaintiff, and those under whom he claims, for more than

22 five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant, Charles Justi.

Filed Aug. 30, 1864.

GEO. C. GORHAM, *Dep'ty*,
P'r W. F. HEUSTIS, *Deputy*.

23 *Answer of Geo. W. Whitman.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET AL., DEFENDANTS.

And now comes George W. Whitman, one of the above-named defendants, (sued as John Doe Whitman,) by E. D. Wheeler and Eugene Lies, his attorneys, and, for his separate answer to the complaint in the above-entitled action, denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for further and separate answer to said complaint this defendant admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

All that certain piece or parcel of land situate in the county of Sonoma, bounded on the west by the stream of water called the "Sonoma Creek;" on the north by land owned by Rogers, and known as
24 "Rogers' 320 acres;" on the east by the hills; and on the south by the "Hooker tract" of six hundred and forty acres, containing three hundred acres, more or less, and known as the "Lieutenant Moore tract."

And this defendant avers that he is the owner in fee and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, for the period of ten years last past; and that during said period this defendant has made permanent improvement thereon, to the value of, at least, the sum of ten thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action. And defendant
25 further avers that he, and those under whom he holds and derives title, now are, and have been, in the exclusive possession of said premises, adversely to the plaintiff and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant, George W. Whitman.

Aug. 30, 1864, due service of a copy of within answer is hereby admitted.

Filed Aug. 30, 1864.

GEO. C. GORHAM, *Cl'k*,
By W. F. HUESTIS, *Dep'ty.*

26 *Answer of Weingarter.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET AL.

And now comes Daniel Weingartner, one of the defendants in the above-entitled action, (sued by a fictitious name,) by E. D. Wheeler and Eugene Lies, his attorneys, and for his separate answer to the complaint in the above-entitled action denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

All the following described and numbered pieces and parcels of land situate and being in the county of Sonoma, in the State of Cali-
27 fornia, that is to say: Beginning at the corner of sections 34, 33, 4, & 3, township 6 & 7 north, range 16 west, Monte Diablo meridian; thence south forty chains to a pile of stones, from which a white oak 20 inches in diameter bears south 43 links, and another white oak 15 inches in diameter bears south 68½ degrees east, magnetic, 30 links; thence east 20 chains to a stake on a hill-side, near two pine trees, one 60 and the other 51 links distant, the former due east from the stake or corner; thence north 80 chains to a stake witnessed by a live-oak 24 inches in diameter, and bearing from the corner magnetic south, 13 links distant, and a black oak 30 inches in diameter bears north 43° degrees east one hundred and thirty links; thence west twenty chains; thence south forty chains to the point of beginning, being the west half of the southwest quarter of section thirty-four, township seven north, range six west; and the west half of the northwest quarter of section three, township six north, range six west, and containing one hundred and sixty acres of land.

And this defendant avers that he is the owner in fee and en-
28 titled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, for the period of eight years last past; and that during said period this defendant has made permanent improvements thereon to the value of, at least, the sum of three thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action.

And defendant further avers that he, and those under whom he holds and derives title, now are, and have been, in the exclusive posses-
29 sion of said premises, adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant, Daniel Weingartner.

(Endorsed:) Due service of copy of within answer is admitted, Aug. 30, 18 4.

Filed Aug. 30, 1864.

GEO. C. GORHAM, *Clk*,
P'r W. F. HUESTIS, *Dep'ty.*

30 *Answer of Charles V. Stewart.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now comes Charles V. Stewart, one of the defendants above-named, by E. D. Wheeler and Eugene Lies, his attorneys, and for his separate answer to the complaint in the above-entitled action denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

That certain ranch or vineyard known as "Stewart's vineyard," lying on the easterly side of the road leading from Sonoma to Santa Rosa; bounded on the northerly by the vineyard or farm of Doct. J. B. Warfield; on the easterly by the Napa Hills; on the southerly by
31 lands claimed and occupied by one Simmons; and on the westerly by said Sonoma and Santa Rosa road, and containing two hundred and fifty acres, more or less.

And this defendant avers that he is the owner in fee and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same, for a long period of time, to wit, for the period of 12 years last past; and that, during said period, this defendant has made permanent improvements thereon, to the value of, at least, the sum of five thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question, at any time, within five years before the commencement of this action. And defendant further
32 avers that he, and those under whom he holds and derives title, now are, and have been, in the exclusive possession of said premises, adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant, Charles V. Stewart.

(Endorsed:) Due service of a copy of within answer is admitted Sept'r 27, 1864.

BROOKS & WHITNEY,
Att'ys for Pl'ff.

Filed in open court this 27th day of Sept., 1864.

GEO. C. GORHAM, *Clk*,
P'r W. F. HUESTIS, *D. C.*

33 *Answer of John Gibson.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now comes John Gibson, one of the defendants above named, by E. D. Wheeler and Eugene Lies, his attorneys, and, for his separate answer to the complaint in the above-entitled action, denies each and every allegation in said complaint contained, except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint, this defendant amits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

That certain piece or parcel of land known as Gibson's vineyard, or ranch, adjoining, on the northeasterly side, the lands of William F. Franklin, and lying easterly from and adjoining the lands of
34 Krone and Williams, and containing one hundred and sixty acres.

And this defendant avers that he is the owner in fee, and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, for the period of eight years last past; and that during that period this defendant has made permanent improvements thereon, to the value of, at least, the sum of five thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action.

And defendant further avers that he, and those under whom he holds and derives title, now are and have been in the exclusive possession of said premises adversely to the plaintiff, and those under
35 whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant John Gibson.

(Endorsed:) Due service of a copy of within answer is admitted, Aug't 30, 1864.

Filed Aug. 30th, 1864. GEO. C. GORHAM, *Clk*,
By W. F. HUESTIS, *Deputy*.

36 *Answer of John Krone and Joseph A. Williams.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now come John Crone and Joseph A. Williams, two of the de-

fendants above named, by E. D. Wheeler and Eugene Lies, their attorneys, and, for their joint answer to the complaint in the above-entitled action, deny each and every allegation in said complaint contained, except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint these defendants admit that they are now in possession of a small portion of the tract of land described in said complaint, described as follows:

That certain piece or parcel of land known as "Krone and Williams'" vineyard or ranch, situate on the northeast side of the Sonoma and Santa Rosa road, and adjoining the lands of W'm F. Franklin and John Gibson, and containing one hundred and sixty acres, more or
37 less.

And these defendants aver that they are the owners in fee and entitled to the possession of said tract of land above described; that these defendants and their grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, of the period of 12 years last past; and that during that period these defendants have made permanent improvements thereon to the value of, at least, the sum of ten thousand dollars.

And for a further and separate answer to the said complaint these defendants say that the plaintiff ought not to have or maintain any action against them for the recovery of the tract of land and premises hereinabove described, because defendants aver that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action.

And defendants further aver that they, and those under whom they hold and derive title, now are, and have been, in the exclusive
38 possession of said premises, adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore these defendants ask that plaintiff take nothing by reason of his said action, and that these defendants have judgment for their costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendants Krone & Williams.

(Endorsed:) Due service of copy within answer is admitted, Aug. 30th, 1864.

Filed Aug. 30th, 1864.

GEO. C. GORHAM, *Clk*,
P'r W. F. HUESTIS, *Deputy.*

39 *Answer of William F. Franklin.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now comes William F. Franklin, one of the defendants above named, by E. D. Wheeler and Eugene Lies, his attorneys, and for his separate answer to the complaint in the above-entitled action denies

each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

Commenceing at the north line of the tract now occupied by Doctor J. B. Warfield, where said line strikes the Santa Rosa road; thence along said road, in a northerly direction, to the southerly boundary line of the lands occupied and claimed by Krone and Williams;
40 thence easterly, on said line, to a red-wood road; thence southerly, along said road, to the place of begining, containing one hundred and sixty acres, more or less, the same being the east half of the southeast quarter of section No. 9, and the west half of the southwest quarter of section No. 10, township No. six (6) north, range No. six (6) west, containing 160 acres.

And this defendant avers that he is the owner in fee, and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last-named tract, claiming to own the same for a long period of time, to wit, for the period of thirteen years last past; and that, during said period, this defendant has made permanent improvements thereon to the value of, at least, the sum of two thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his
41 ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action. And defendant further avers that he, and those under whom he holds and derives title, now are and have been in the exclusive possession of said premises adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant W'm F. Franklin.

(Endorsed:) Aug't 30th, 1864, due service of copy within answer hereby admitted.

Filed Aug. 30, 1864.

GEO. C. GORHAM, *Clk.*
P'r W. F. HUESTIS, *Deputy.*

42 *Answer of Jacob B. Warfield.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now comes Jacob B. Warfield, one of the defendants above

named, by E. D. Wheeler and Eugene Lies, his attorneys, and for his separate answer to the complaint in the above-entitled action denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that he is now in possession of a small portion of the tract of land described in said complaint, described as follows:

Bounded on the south by the ranch or vineyard of Charles V. Stewart; on the west, by the road leading from the village of Sonoma to the village of Santa Rosa; on the north by the ranch or farm of William F. Franklin; and on the east by the Napa Hills, containing one
43 hundred and thirty acres, more or less.

And this defendant avers that he is the owner in fee and entitled to the possession of said tract of land above described; that this defendant and his grantors have been in the open and notorious possession of said last named tract, claiming to own the same for a long period of time, to wit, for the period of ten years last past; and that during said period this defendant has made permanent improvements thereon to the value of, at least, the sum of five thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against him for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action.

And defendant further avers that he, and those under whom he holds and derives title, now are and have been in the exclusive possession of said premises adversely to the plaintiff, and those under whom
44 he claims, for more than five years next before the commencement of this action.

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for his costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendants J. B. Warfield.

(Endorsed:) Due service of a copy of within answer admitted this 9th Sept'r, 1864.

BROOKS & WHITNEY,
Att'ys for Pl'ff.

Filed Sept. 9th, 1864.

GEO. C. GORHAM, *Clk*,
P'r W. F. HUESTIS, *Deputy.*

45 *Answer of Martha C. Watriss.*

In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

And now comes Martha C. Watriss, one of the defendants abovenamed, by E. D. Wheeler and Eugene Lies, her attorneys, and for her

separate answer to the complaint in the above-entitled action denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

And for a further and separate answer to said complaint this defendant admits that she is now in possession of a small portion of the tract of land described in said complaint, described as follows:

All that certain piece or parcel of land situate in Sonoma County, California, the same being one mile square, and containing six hundred and forty acres; bounded on the west by Sonoma Creek; on the east by land supposed to be public land; on the north by a ranch belonging, or formerly owned by one Moore; and on the south by a ranch owned by one Kamp, being the same tract conveyed by Joseph Hooker to Frank S. Brown by deed bearing date February 9th, 1858.

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And this defendant avers that she is the owner in fee, and entitled to the possession of said tract of land above described; that this defendant and her grantors have been in the open and notorious possession of said last-named tract, claiming to own the same, for a long period of time, to wit, for the period of 15 years last past; and that during said period this defendant has made permanent improvements thereon to the value of, at least, the sum of ten thousand dollars.

And for a further and separate answer to the said complaint this defendant says that the plaintiff ought not to have or maintain any action against her for the recovery of the tract of land and premises hereinabove described, because defendant avers that the plaintiff, his ancestor, predecessor, or grantor, were not, nor was either or any of them, seized or possessed of the premises in question at any time within five years before the commencement of this action. And defendant further avers that she, and those under whom she holds and derives title, now are and have been in the exclusive possession of said premises adversely to the plaintiff, and those under whom he claims, for more than five years next before the commencement of this action.

47

Wherefore this defendant asks that plaintiff take nothing by reason of his said action, and that this defendant have judgment for her costs.

E. D. WHEELER and
EUGENE LIES,
Attorneys for Defendant Martha C. Watriss.

(Endorsed:) Due service of a copy of within answer is admitted, Sept'r 9, 1864.

BROOKS AND WHITNEY,
Att'ys for Pl'ff.

Filed Sept. 9th, 1864.

GEO. C. GORHAM, *Clerk*,
P'r W. F. HUESTIS, *Deputy.*

48 *Findings.*

Circuit court of the United States, northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

This case was called on for trial before the circuit court on the first day of September instant, and a jury was duly empanneled and sworn

to try the issues therein, and evidence was produced by the respective parties. On the fourth day of September, after evidence had been introduced on both sides, on motion of the plaintiffs' attorney and by consent of the attorneys of the defendants Joseph E. Brockman, Alexander Dunbat, Lucy Box, and Clara A. Johnson, the action was dismissed as to said four defendants without costs; and after the evidence on both sides was concluded, the attorneys of the other parties who had appeared in the action stipulated that the jury should be discharged, and that the issues in this cause should be tried and determined by the court without a jury. The jury were accordingly discharged, and the evidence
49 in the case, and the arguments of counsel having been heard thereon, the court finds therefrom the following facts:

1st. That on the fourteenth day of October, 1839, one Lazaro Pena presented a petition to the commandant general of the department of California for a grant of land situated in the present county of Sonoma, in the State of California, known by the name of Agua Caliente, of which land Pena had been years previously in the possession; and said commandant gave to him a provisional concession of the land until he should petition the government for the proper title.

2nd. That afterwards, on the thirteenth day of October, 1840, Pena obtained a grant of the land from Alvarado, then governor of the department of California, and on the eighth day of October, 1845, the said grant was approved by the departmental assembly.

3d. That pending the proceedings to obtain the grant the petitioner, Pena, sold and conveyed by a legal and proper instrument all his interest in the land to Mariano G. Vallejo.

4th. That Mariano G. Vallejo subsequently, on the second day
50 of March, 1853, presented a petition to the board of land commissioners, created under the act of March 3d, 1851, for a confirmation of his claim under said grant; that by the said board his claim was rejected; that afterwards, on appeal, the district court of the United States for the northern district of California confirmed his claim. The decree of confirmation was entered on the thirteenth day of July, 1859. The land, of which confirmation was thus made, is described in the decree of confirmation as "situated in the present county of Sonoma, and is of the extent of two leagues and a half in length by a quarter of a league in width and known by the name of 'Agua Caliente,' and is bounded on the southwest by the arroyo of the rancho of Petaluma; on the southeast by the town of Sonoma; on the north by the hills and mountains which intervene and separate the rancho of George Yount; and on the northwest by the rancho of Mr. John Wilson." The decree of confirmation is accompanied by the following proviso: "Provided, that this confirmation of the above land to the said M. G. Vallejo
51 shall be without prejudice to the rights of the legal representatives of Lazaro Pena, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo shall enure to the benefit of any person or persons who may own or be entitled to said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent or otherwise."

5th. That afterwards, on appeal to the Supreme Court of the United States, the said decree of the district court was at the December term, 1861, affirmed.

6th. That the tract known as Agua Caliente, and thus confirmed, embraces the premises described in the complaint which lie east of the Calabezas Creek, but does not embrace the premises which lie west of the said creek.

7th. That the defendants, except Joseph E. Brockman, Alexander Dunbar, Lucy Box, and Clara A. Johnson, were in the possession and occupation of the premises in controversy, lying east of the said
52 Calabezas Creek, at the commencement of the present action, and still are in such possession and occupation.

8th. That on the eighth of March, 1849, Mariano G. Vallejo, for the consideration of eight thousand dollars, by a deed duly executed and delivered, sold and conveyed to John B. Frisbie the tract of land above designated, known as Agua Caliente, granted to Peña, and confirmed to said Vallejo as aforesaid.

9th. That on the 24th of August, 1858, the said John B. Frisbie, for the consideration of eight thousand dollars, by a deed duly executed and delivered, resold and reconveyed back to Mariano G. Vallejo the same tract of land known as Agua Caliente; which deed was recorded in the office of the recorder of Sonoma County on the same day.

10th. That on the seventeenth day of January, 1863, for the consideration of three thousand dollars, the said Mariano G. Vallejo, by a deed executed and delivered, sold and conveyed to the plaintiff, Emil Steinbach, all his interest, right, and title to the said tract Agua Ca-
53 liente; which deed was recorded on the 21st of the same month in the office of the recorder of the county of Sonoma.

11th. That on the fifth day of February, 1864, the said Mariano G. Vallejo, for the consideration of three thousand dollars, executed and delivered to said plaintiff, Emil Steinbach a second deed of all his right, title, and interest in the said tract of land known as Agua Caliente which deed was recorded in the office of the recorder of Sonoma County on the third day of December, 1864.

12th. That said plaintiff, Emil Steinbach, paid to said Mariano G. Vallejo, for the said deeds of the said tract, a valuable consideration at the time, and that he made the purchase of said tract and received said deeds without knowledge or notice actual or constructive of any other conveyances of said premises or of any interest therein by said Mariano G. Vallejo, except as given by the actual, open, and notorious possession and occupation of the defendants George W. Whitman, Martha C. Watriss, J. B. Warfield, and Charles V. Stewart, as hereinafter mentioned.

54 13th. That on the twelfth day of August, 1846, the said Mariano G. Vallejo executed and delivered to Andres Hoppner a conveyance of all his rights in the above tract of land known as Agua Caliente, granted to Lazaro Pena as aforesaid.

14th. That the defendant George W. Whitman is in the actual possession and occupation of the following described premises, namely: "All that certain piece or parcel of land situate in the county of Sonoma, bounded on the west by the stream of water called the Sonoma Creek; on the north by land owned by Rodgers, and known as 'Rodgers'' 320 acres; on the east by the Hills; and in the south by the 'Hooker tract,' of six hundred and forty acres, the eastern boundery to be drawn so that the tract shall contain three hundred acres and no more, and known as the Lieutenant Moore tract;" which said described premises of three hundred acres are a parcel of the tract known as Agua Caliente, granted to Lazaro Pena, and confirmed to said Mariano G. Vallejo; that said Whitman derives his claim and title to the said
55 described premises by various mesne conveyances from said Andres Hoeppner; that the said several mesne conveyances are regular in their form, and were duly executed for a valuable consideration received at the time, and they transfer to the several grantees therein

named all the estate and title of the said Andres Hoeppner in and to the said described premises of three hundred acres; that the said several grantees in said mesne conveyances, at the time they received their respective conveyances, entered into possession of the said described premises and continued in the open and notorious possession of the same until they parted with their interests; and the said Whitman was in said open and notorious possession of the same at the time of the conveyances of said Mariano G. Vallejo to the plaintiff, Emil Steinbach, above stated.

15th. That the defendant Martha C. Watriss is in the actual possession and occupation of the following described premises, namely: "All that certain piece or tract of land situate in Sonoma County,
56 California, the same being one mile square, and containing six hundred and forty acres, bounded on the west by Sonoma Creek; on the east by a line one mile from and parallel to Sonoma Creek; on the north by a ranch belonging or formerly owned by one Moore; and on the south by a ranch owned by one Kamp, being the same tract conveyed by Joseph Hooker to Frank S. Brown by deed bearing date February 9th, 1858," which said described premises of six hundred and forty acres are a parcel of the tract known as Agua Caliente, granted to Lazaro Peña, and confirmed to said Mariano G. Vallejo; that said Martha C. Watriss derives her claim and title to said described premises by various mesne conveyances from said Andres Hoeppner; that the said several mesne conveyances are regular in their form and were duly executed for a valuable consideration received at the time, and they transfer to the several grantees therein named all the estate and title of the said Andres Hoeppner in and to the said described premises of six hundred and forty acres; that the said several grantees
57 in said mesne conveyances, at the time they received their respective conveyances, entered into possession of the said described premises and continued in the open and notorious possession of the same until they parted with their interests; and the said Martha C. Watriss was in such open and notorious possession of the same at the time of the conveyances of said Mariano G. Vallejo to the plaintiff, Emil Steinbach, above stated.

16th. That previous to the year 1857 the said Andres Hoeppner died intestate and without issue, leaving a widow, Anna Hoeppner, who was his sole heir; that on the 21st of December, 1858, the said Anna Hoeppner, by her deed duly executed and delivered, for a valuable consideration sold and conveyed to James R. Travers all her right, title, and estate in and to the aforesaid tract, known as Agua Caliente; which deed was recorded in the office of the recorder of Sonoma County on the seventh of January, 1859.

58 17th. That the defendant Charles V. Stewart is in the possession and occupation of the following described premises: That certain ranch or vineyard known as "Stewart's vineyard," lying on the easterly side of the road leading from Sonoma to Santa Rosa, bounded on the northerly side by the vineyard or farm of Doctor J. B. Warfield; on the easterly by the Napa Hills; on the southerly by lands claimed and occupied by one Simmons; and on the westerly by said Sonoma and Santa Rosa road; the easterly line to be drawn so as with the other lines to embrace two hundred and fifty acres and no more; that the said Stewart derives whatever claim and title he possesses to said described premises of two hundred and fifty acres by mesne conveyances from said Anna Hoeppner through the said James R. Travers; that through said mesne conveyances he acquired on the

3d of September, 1859, one undivided half interest in the property and estate sold and conveyed as aforesaid to said James R. Travers;
59 that the conveyance to him was executed for a valuable consideration paid at the time, and was duly recorded in the office of the recorder of Sonoma County within a few days after its execution; that the other undivided half interest is outstanding in said James R. Travers, or parties claiming under him; that at the time and previous to the conveyance to him the defendant was in the possession of the said described premises of two hundred and fifty acres, and also of one hundred and thirty additional acres adjoining said two hundred and fifty acres, which one hundred and thirty acres he afterwards sold and conveyed to the defendant T. B. Warfield as hereinafter stated; that through said mesne conveyances the said defendant claimed to own and hold the one undivided half of the said three hundred and eighty acres; and he was in the open and notorious possession of the same at the time of the conveyance of Mariano G. Vallejo to the plaintiff, Emil Steinbach, above stated.

60 18th. That the defendant Jacob B. Warfield is in the open and notorious possession of the following described premises: "Bounded on the south by the ranch or vineyard of Charles V. Stewart; on the west by the road leading from the village of Sonoma to the village of Santa Rosa; on the north by the ranch or farm of William F. Franklin; and on the east by a line on the Napa Hills, so drawn as with the other line to contain one hundred and thirty acres and no more;" that said premises are a part and parcel of the tract known as Agua Caliente; that the said defendant derives his claim and title to the said described premises of one hundred and thirty acres by deed duly executed and delivered to him for the consideration of $3,000, by the defendant Charles V. Stewart, on the 29th of September, 1862, and which was duly recorded in the office of the recorder of Sonoma County on the 29th day of October, of the same year.

19th. That on the 17th day of May, 1858, the said Anna Hoeppner, widow of Andres Hoeppner, by a deed executed and delivered,
61 for a valuable consideration sold and conveyed to John L. Green the tract of land known as Agua Caliente, and which deed was recorded on the 10th of July, 1863, in the office of the recorder of Sonoma County.

20th. That said John L. Green, on the 2d day of January, 1864, by a deed duly executed and delivered, for a valuable consideration sold and conveyed to the plaintiff, Emil Steinback, the said tract of land known as Agua Caliente, and which deed was recorded on the 22nd day of October, 1864, in the office of the recorder of Sonama County.

And as conclusions of law from the above facts the court finds:

1st. That the open and notorious possession of the defendants George W. Whitman, Martha C. Watriss, Charles V. Stewart, and Jacob B. Warfield was sufficient notice to the plaintiff when he purchased the tract Agua Caliente of Mariano G. Vallejo, of their title and interest in the parcels respectively occupied by them, to prevent the plaint-
62 iff from claiming said several tracts as a bona-fide purchaser without notice.

2nd. That the plaintiff is seized and entitled to the possession of, and at the commencement of this action was seized and entitled to the possession of, all the premises described in the complaint, known as Agua Caliente, lying east of the Calabazas Creek, except the four parcels hereafter described, namely:

First parcel occupied by the defendant George W. Whitman, which

is described and bounded as follows: "All that certain piece or parcel of land situate in the county of Sonoma, bounded on the west by the stream of water called the "Sonoma Creek;" on the north by land owned by Rodgers, and known as "Rodgers'" 320 acres; on the east by a line parallel to Sonoma Creek, and sufficiently distant therefrom to contain with the other lines 300 acres and no more; and on the south by the "Hooker Tract" of six hundred and forty acres, more or less, and known as the Lieutenant Moore tract."

Second parcel occupied by the defendant Martha C. Watriss,
63 which is described and bounded as follows: "All that certain piece or tract of land situate in Sonoma County, California, the same being one mile square, and containing six hundred and forty acres; bounded on the west by Sonoma creek; on the east by a line one mile distant from said creek and parallel thereto; on the north by ranch belonging or formerly owned by one Moore; and on the south by a ranch owned by one Kamp; being the same tract conveyed by Joseph Hooker to Frank L. Brown by deed bearing date February 9th, 1858.

Third parcel occupied by the defendant Charles V. Stewart, which is described and bounded as follows: "That certain ranch or vineyard known as Stewart's vineyard, lying on the easterly side of the road leading from Sonoma to Santa Rosa; bounded on the northerly by the vineyard or farm of Doctor J. B. Warfield; on the easterly by a line parallel to the Sonoma and Santa Rosa road, and sufficiently distant therefrom to contain with the other lines 250 acres and no more; on the southerly by lands claimed and occupied by one Simmons; and on
64 the westerly by said Sonoma and Santa Rosa road; and containing two hundred and fifty acres and no more."

Fourth parcel occupied by the defendant Jacob B. Warfield, which is bounded and described as follows: "Bounded on the south by the ranch or vineyard of Charles V. Stewart; on the west by the road leading from the village of Sonoma to the village of Santa Rosa; on the north by the ranch or farm of William F. Franklin; and on the east by a line on the Napa Hills, sufficiently distant from said road, with the other lines, to contain one hundred and thirty acres and no more. And the said defendants George W. Whitman and Martha C. Watriss were at the commencement of this action, and ever since have been, seized and entitled to the possession of the said two described parcels occupied by them respectively; and the defendants Charles V. Stewart and Jacob B. Warfield were at the commencement of this action, and ever since have been, seized and possessed of the one undivided half of the two above-described parcels occupied by them respectively, and the remaining undivided half of said two parcels is still outstanding in said James
65 R. Travers or parties claiming under him.

A judgment will therefore be entered in favor of the plaintiff against all the defendants except the defendants George W. Whitman, Martha C. Watriss, Charles V. Stewart, and Jacob B. Warfield, for the possession of the entire premises described in the complaint, lying east of the Calabazas Creek; and a judgment will be entered in favor of the defendants George W. Whitman, Martha C. Watriss, Charles V. Stewart, and Jacob B. Warfield for the several parcels occupied by them respectively, as above described. Costs will be allowed to the plaintiff against all the defendants except the said four defendants, and costs will be allowed to them against the plaintiff.

FIELD, *J.*

SEPTEMBER 15TH, 1865.

(Endorsed:) Filed Sept. 15, 1865.

GEO. C. GORHAM, *Clerk.*

66 *Order that complaint be amended by adding certain other defendants.*

At a regular term of the circuit court of the United States of Ameria, for the northern district of California, held at the court-house in the city of San Francisco, on Tuesday, the 31st day of May, in the year of our Lord one thousand eight hundred and sixty-four:

Present, the Honorable Ogden Hoffman, U. S. district judge.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET AL. } At common law.

And now at this day, on motion of Mr. Whitney, one of the attorneys for plaintiff, and on reading and filing his affidavit, it is ordered that the complaint in this action be amended by adding the following defendants, to wit:

Daniel Weingarten, John Doe Ackerman, whose true name is to plaintiff unknown, Christian Wise, Louis Wall, Hugh Nun, James Hamilton, John Bowen, Caspar Shuster, Jane Doe Whitman, Richard Roe Whitman, the two first names of which two persons last named are to the plaintiff unknown, and Jihon Schmidd and Voe Seff, whose real
67 names are to plaintiff unknown.

(Endorsed:)

Circuit court of the United States for the northern district of California.

CLERK'S OFFICE:

I hereby certify the foregoing to be a true copy from the minutes.

GEO. C. GORHAM, *Clerk.*

Filed this 25th day of Sept., 1865.

GEO. C. GORHAM, *Clerk.*

68 *Judgment.*

Circuit court of the United States, northern district of California.

EMIL STEINBACH, PLAINTIFF,
vs.
CHARLES V. STEWART ET ALS., DEFENDANTS. } June term, 1865.

This cause came on to be heard at the present term of the court, the said plaintiff appearing by his attorneys, Messrs. Brooks & Whitney; the defendants Charles V. Stewart, Henry Guerne, George Gurne, Henrietta Guerne, Jacob B. Warfield, William F. Franklin, Charles Justi, George E. Watriss, (sued as John Doe Watriss,) and Martha C. Watriss, his wife, John Gibson, John Kron, Josept A. Williams, George W. Whitman, (sued as John Doe Whitman,) Daniel Weingarten, Louis Wall, Caspar Shuster, Nancy A. Whitman, (sued as Jane Doe Whitman,) Henry Whitman, (sued as Richard Roe Whitman,) and Thomas Now, (sued as Jean Smeets,) appearing by their attorney, E. D. Wheeler, esq., and Eugene Lies, esq.; the defendants Lucy Box, (sued as Voe Leef,) Joseph E. Brockman, (sued as Hans Schmidt,)
69 Alexander Dunbar, (sued as Joan Schmithweiski,) and C. A. Johnson, (sued as Ton Qa Smittia,) appearing by their attorney, J. J. Papy, esq.; the defaults of the defendants John Simmons, Chris.

Ackerman, (sued as John Doe Ackerman,) Christian Wise, Hugh Nun, and Hermann F. Brockman, (sued as John Smith,) having been heretofore entered; and the defendants Jacob Underhill, James Hamilton, John Bowen, John Schmidt, and Johannus Smithers, mentioned in the complaint, never having been served with the summons herein, and never having appeared herein, not appearing, a jury was duly empannelled and sworn to try the issues therein, and evidence was produced by the respective parties; and subsequently, after evidence had been introduced on both sides, on motion of the plaintiff's attorneys, and by consent of the attorneys of the defendants Joseph E. Brockman, Alexander Dunbar, Lucy Box, and C. A. Johnson, the action was dismissed as to said four defendants without costs; and after the evidence on both sides was concluded the attorneys of the plaintiff and of the remaining defendants who had appeared in the action, filed a stipulation in
70 writing with the clerk, that the jury should be discharged, and that the issues in this cause should be tried and determined by the court without a jury. The jury were accordingly discharged, and the evidence in the case and the arguments of counsel having been heard thereon the court subsequently filed its findings of facts and conclusions of law, and judgment having been ordered in accordance with the said findings:

Now, in consideration of the law and the premises, it is ordered and adjudged that the said plaintiff take nothing by reason of his action as against the said defendants Joseph E. Brockman, Alexander Dunbar, Lucy Box, and C. A. Johnson, and that the said four defendants go hence without day.

And it is further ordered and adjudged that the said plaintiff do have and recover of and from the defendants John Simmons, Henry Guerne, George Guerne, Henrietta Guerne, William F. Franklin, Charles Justi, George E. Watriss, John Gibson, John Kron, Joseph A. Williams, Daniel Weingarten, Chris. Ackerman, Christian Wise, Louis Wall, Hugh Nun, Casper Shuster, Nancy A. Whitman, Henry Whitman, Her-
71 man F. Brockman, and Thomas Now the possession of the entire premises described in the complaint lying east of the Calabazas Creek, except the four parcels hereinafter described, the description of the entire premises mentioned in the complaint being as follows:

"That certain piece or parcel of land situated, lying, and being in the county of Sonoma, and within the northern district of California, known as the Rancho 'Agua Caliente,' and bounded and described as follows: On the southwest by the creek formerly known as the creek of the rancho of Petaluma, and now known as Sonoma Creek; on the southeast by the former pueblo now city of Sonoma; on the north by the tops of the hills intermediate of and dividing it from the rancho of George Yount; and on the northwest by the rancho and creek of 'Los Guilicos.'"

Together with his proper costs and disbursements in this action, amounting to the sum of four hundred and six dollars and forty cents.

And it is further ordered and adjudged that the said plaintiff take nothing, by reason of his said action, as against the said defend-
72 ants George W. Whitman, Martha C. Watriss, Charles V. Stewart, and Jacob B. Warfield; that the said four defendants go hence without day; and that they do have and recover of and from the said plaintiff, Emile Steinbach, their proper costs and disbursements in this action, amounting to the sum of three hundred and fifty-one dollars and forty cents.

And it is further ordered and adjudged that the said defendant George W. Whitman is seized and entitled as against the said plaintiff to the possession of the following described tract or parcel of land:

"All that certain piece or parcel of land situate in the county of Sonoma, bounded on the west by the stream of water called the 'Sonoma Creek;' on the north by land owned by Rogers, and known as 'Rogers'' 320 acres; on the east by a line parallel to Sonoma Creek, and sufficiently distant therefrom to contain, with the other lines, 300 acres, and no more; and on the south by the 'Hooker tract' of six hundred and forty acres, more or less, and known as the 'Lieutenant Moore tract.'"

And it is further ordered and adjudged that the said defendant
73 Martha C. Watriss is seized and entitled, as against the said plaintiff, to the possession of the following described tract or parcel of land:

"All that certain piece or tract of land situate in Sonoma County, California, the same being one mile square, and containing six hundred and forty acres; bounded on the west by Sonoma Creek; on the east by a line one mile distant from said creek, and parallel thereto; on the north by ranch belonging or formerly owned by one Moore; and on the south by a ranch owned by one Kamp, being the same tract conveyed by Joseph Hooker to Frank L. Brown by deed bearing date February 9th, 1858."

And it is further ordered and adjudged that the said defendant Charles V. Stewart is seized and entitled, as against the said plaintiff, to the possession of the following described tract or parcel of land:

"That certain rancho or vineyard known as 'Stewart's vineyard,' lying on the easterly side of the road leading from Sonoma to
74 Santa Rosa, bounded on the northerly by the vineyard or farm of Doctor J. B. Warfield; on the easterly by a line parallel to the Sonoma and Santa Rosa road, and sufficiently distant therefrom to contain, with the other lines, 250 acres, and no more; on the southerly by lands claimed and occupied by one Simmons; and on the westerly by said Sonoma and Santa Rosa road, and containing two hundred and fifty acres, and no more."

And it is further ordered and adjudged that the said defendant Jacob B. Warfield is seized and entitled as against the said plaintiff to the possession of the following described tract or parcel of land:

"Bounded on the south by the ranch or vineyard of Charles V. Stewart; on the west by the road leading from the village of Sonoma to the village of Santa Rosa; on the north by the ranch or farm of William F. Franklin; and on the east by a line on the Napa Hills, sufficiently distant from said road with the other lines to contain one hundred and thirty acres, and no more."

Entered this 25th day of September, 1865.

GEO. C. GORHAM, *Clerk.*

75 (Endorsed:) I certify the foregoing to be a full, true, and correct transcript of the judgment in the therein entitled cause.

Sept. 25, 1865.

GEO. C. GORHAM, *Clerk.*

Filed Sept. 25, 1865.

GEO. C. GORHAM, *Clerk.*

76 *Clerk's certificate.*

The United States of America, in the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET AL.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I, Geo. C. Gorham, clerk of the circuit court of the United States for the northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment record in the above entitled cause.

Witness my hand and the seal of said court this 25th day of September, A. D. 1865.

GEO. C. GORHAM, *Clerk.*

(Endorsed:) Filed Sept. 25, 1866.

GEO. C. GORHAM, *Clerk.*

77 UNITED STATES OF AMERICA, *ss:*

To Charles V. Stewart, Jacob B. Warfield, George W. Whitman, and Martha C. Watriss, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the first Monday of December, A. D. 1868, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein Emil Steinbach is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

August 26th, 1868.

STEPHEN J. FIELD,
Associate Justice Supreme Court of the U. S.

(Endorsed:) Received a copy of the within citation this 26th day of August, 1868, and accept the same as the attorneys for the respondents in the writ of error of which this is notice of its being issued.

E. D. WHEELER,
Def'ts Att'y.

Filed 30 December, 1868.

GEO. E. WHETNEY, *Clerk.*

78 In the circuit court of the United States in and for the northern district of California.

EMIL STEINBACH
vs.
CHARLES V. STEWART ET ALS.

Plaintiff's statement on motion for new trial.

This cause came on to be tried before the honorable Stephen J. Field, circuit judge, and a jury duly empannelled on the first day of September, A. D. 1865. After the evidence was closed, it was stipulated and agreed that the jury should be discharged and the case submitted to the

judge for his finding and decision, as if the case had been tried before the court sitting without a jury.

The court afterwards, to wit, on the fifth day of September, A. D. 1865, filed its findings in favor of this plaintiff as to all of the defendants and the lands occupied by them except the defendants Charles V. Stewart, Jacob B. Warfield, George W. Whitman, Martha C. Watriss, and George E. Watriss, and as to those defendants and certain lands particularly described in the finding directed a judgment in favor of said last-named defendants.

The plaintiff thereupon gave notice of his intention to move for a new trial as to the defendants last named, stating generally the grounds of said motion, that the evidence was insufficient to support the said
79 finding and decision, and that the same was against law and for errors of law occurring at the trial and excepted to by the plaintiff.

And he now makes this his statement for the purposes of the said motion, and specifies the grounds of his said motion to be as follows:

That the evidence is insufficient to support the said finding and decision in this, to wit: That all the facts found in the finding and which the evidence in the case tended to prove do not show that the plaintiff had not, or that the said defendants had, the legal title to the parcels of land occupied by them.

That the said finding is against law in this: That if the facts are as found in the said finding the plaintiff is entitled to judgment against said defendants for said parcels of land, and the said defendants are not entitled to judgment.

And he specifies the errors occurring at the trial and excepted to by him to be the same which are set forth specifically and in detail in the proposed bill of exceptions in the cause, heretofore filed by him, but not signed by the said circuit judge, which he makes a part of this his statement and which is in the words and figures following:

"This cause came on to be tried on the 1st day of September, A. D. 1865, before the Hon. Stephen J. Field, circuit judge, sitting
80 without a jury, a jury having been expressly waived by consent in open court.

"The plaintiff, to maintain and prove the issues joined on his part, put in evidence the expediente of the grant of the Rancho Agua Caliente to Lagaro Pena, No. 229, dated 13th July, 1840, approved by the departmental assembly, October 8th, 1845, which expediente and order are hereto annexed, marked C & D, and made part of this statement.

"2. Petition of M. G. Vallejo to the United States board of land commissioners, filed 2nd March, 1853, for confirmation of the title aforesaid, filing of the transcript, and appeal to the United States district court, and the decree of the district court in that case, dated July 5, 1859, and the decree and mandate of the Supreme Court in the same case on appeal; which decrees are in these words:

"United States district court, northern district of California.

"UNITED STATES, APPELLEE, } v. M. G. VALLEJO, APPELLANT. } No. 153, Agua Caliente.

"STATED TERM, *July* 5, 1859.

"On appeal from the final decision of the board of commissioners to ascertain and settle land claims in the State of California.

81 "*Decree.*

"This cause came on to be heard on appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California, under the act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision of said board and upon the evidence adduced in this court, and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed that the decision of the said board be, and the same is hereby, vacated, annulled, and reversed.

"And it is further ordered, adjudged, and decreed that the claim of the appellant is a good and valid claim, and that the same be, and is hereby, confirmed. The land of which confirmation is made is situated in the present county of Sonoma, and is of the extent of two leagues and a half in length by a quarter of a league in width, and known by the name of 'Agua Caliente,' and is bounded on the southwest by the arroyo of the rancho of Petaluma; on the southeast by the town of Sonoma; on the north by the hills and mountains which intervene and separate the rancho of George Yount; and on the northwest by the rancho of Mr. John Wilson, being the same land which was granted by Lagaro Peña, by Governor Alvarado, reference being had for a
82 more particular description to the petition of Lagaro Peña, dated 14th October, 1839, the decree of concession by Governor Alvarado, dated 13th July, 1840, the map in the expediente, and the approval of the departmental assembly, certified copies of which are on file in the case.

"Provided that this confirmation of the above land to the said M. J. Vallejo shall be without prejudice to the rights of the legal representatives of Lagaro Peña, the original grantee, or whoever may be entitled to said lands under him, and said confirmation to said Valleja enure to the benefit of any person or persons who may own or be entitled to said land by any title, either at law or in equity, derived from the original grantee by deed, device, descent, or otherwise.

"OGDEN HOFFMAN,
"*Dis't Judge.*

Endorsed: No. 153. U. S. district court, northern district of California. United States vs. M. J. Vallejo. Decree filed July 13th, 1859. W. H. Chevers, clerk.

83 "UNITED STATES OF AMERICA, *ss:*

"The President of the United States of America to the honorable the judge of the district court of the United States for the northern district of California, greeting:

"Whereas lately, in the district court of the United States for the northern district of California, before you, in a cause between M. J. Vallejo, appellant, and the United States, appellee, the decree of the said district court was in the following words, to wit:

"'It is ordered, adjudged, and decreed that the decision of the said board be, and the same is hereby, vacated, annulled, and reversed.

"'And it is further ordered, adjudged, and decreed that the claim of the appellant is a good and valid claim, and that the same be, and is hereby, confirmed.

"'The land of which confirmation is made is situated in the present county of Sonoma, and is of the extent of two leagues and a half in length, by a quarter of a league in width, and known by the name of

Agua Caliente, and is bounded on the southwest by the arroyo of the rancho of Petaluma; on the southeast by the town of Sonoma; on the north by the hills and mountains which intervene and separate
84 the rancho of Mr. John Wilson, being the same land which was granted to Lazaro Peña, by Governor Alvarado, reference being had for a more particular description to petition of Lazaro Peña, dated 14 October, 1839, the decree of concession by Governor Alvarado, dated 13th July, 1840, the map in the expediente, and the approval of the departmental assembly, certified copies of which are on file in the case.

"'Provided that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said land under him, and said confirmation to said Vallejo shall enure to the benefit of any person or persons who may own or be entitled to said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent, or otherwise.'

"As by the inspection of the transcript of the record of the said district court which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

"And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty-one, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel, on consideration whereof it is the opinion of this court that the original grant to Lazaro Peña is a good and valid grant, and that the same should be confirmed.
85 "Whereupon it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause, in so far as it confirms the original grant, be, and the same is hereby, affirmed. 3d March.

"You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity to the opinion and decree of this court as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

"Witness the Honorable Roger B. Tany, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-one.

"WILLIAM THOMAS CARROLL,
"*Clerk of the Supreme Court of the United States.*

"3. Plaintiff then offered in evidence espediente No. 65 of the concession by the Mexican government of certain premises to Ignacio Pacheco granted by Mariano Chico, political chief of Alta California, together with a translation thereof. The petition is dated December 30th, 1835, 'for the land marked out on the annexed desiño known by the name of Agua Caliente. This land is bounded by the pueblo
86 of Sonoma on the east, and on the south by that of Petaluma, and the extent is of one square league.' And after the usual references and reports the order of concession was made on the 7th May, 1836, 'declaring the citizen Ignacio Pacheco owner in fee of the land named Agua Caliente se declara al C. Ignacio Pacheco dueño en propiendad del terreno nombrado Agua Caliente.

"The grant was approved by the departmental junta on the 19 of July, 1836. There is no limitation of quantity, neither in the coda of concession or in the approval. There was no juridicial possession, and the

claim never was presented to the board of U. S. land commissioners for confirmation.

"The expediente & the translation thereof are hereto annexed marked A & B, and made part of this statement.

"4. The plaintiff at the same time offered in evidence a deed from the said Ignacio Pacheco to the plaintiff's grantor, M. G. Vallejo, dated December 7th, 1852, duly acknowledged and recorded on the same day in the county recorder's office, Sonoma County, purporting to convey the whole of said Rancho Agua Caliente.

"The defendants objected to the admissibillity of this concession and deed in evidence, and the court refused to receive them, to which ruling and exclusion the plaintiff excepted and the exception was duly noted.

"5. The plaintiff then offered and read in evidence a deed from M. G. Vallejo to John B. Frisbie, dated March 8, 1849, acknowledged before the alcalde and recorded on the same day in the records
87 kept in the alcalde's office at Sonoma.

"6. Also a deed from John B. Frisbie to M. G. Vallejo, dated August 24, 1858, duly acknowledged and recorded on the same day in the county recorder's office, Sonoma County.

"7. Also deed from M. G. Vallejo to Emil Steinbach, dated January 17, 1863, duly acknowledged and recorded Jan'y 21, 1863, in the county recorder's office, Sonoma County.

"8. Also a deed from Mariano G. Vallejo to Emil Steinbach, the plaintiff, dated February 5, 1854, duly acknowledged and recorded December 3d, 1864, in the county recorder's office, Sonoma County.

"All the foregoing cover the entire ranch.

"The plaintiff proved by Charles C. Tracy the boundaries of the tract of land, and by T. M. Leavenworth that the defendants were respectively in possession of so much thereof as is described in their respective answers on file, and it was admitted they occupied adversely.

"The plaintiff here rested his case.

"The defendants then offered to show title in themselves derived ftom Lagaro Peña.

"*1st exception.*

"The plaintiff objected to the reception of such evidence on the ground that such evidence tended only at the most to make an equitable title in the defendants; that no such defence had been set up in the answer, nor could such defence be made in an action of ejectment; therefore that such evidence was incompetent, immaterial, and irrevelant. The court overruled the objection, to which ruling of the
88 court plaintiff duly excepted, and which exception was duly noted.

"*2nd exception.*

"The defendants Martha C. Watriss, George E. Watriss, George W. Whitman, Charles V. Stewart, and Jacob B. Warfield then proceeded to offer evidence to connect themselves with the plaintiff's grantor, M. G. Vallejo, and for this purpose they offered in evidence a paper writing, the execution whereof was duly proved, which is endorsed on the expediente to Lagaro Peña, and which is in the words and figures following:

"'Que suscriba certifica que habiendo comprad resp't'e'ma y formalo-
n'to al C. Lazaro Peña el terreno de la Agua Caliente, agui se repecalla

ant' e aprobacion de la asamblia departmental de la Alta Calif'a; cedo y transparo todas los derechos que tengo al mencionadas terrenos en faber de D'a Andres D. Hoeppener, quien hara del el uso que mas le convenga y para los finis y usos necess's day este en Sonoma á 12 de agoste de 1846.

"'M. G. VALLEJO.

"'Testigo:

"'A. A. HENDERSON,

"'*Ass't Surgeon, U. S. Ship Portsmouth.*

"'JACOB P. LEESE.'

"And of which the following is a correct translation:

89 "'The undersigned certifies that he legitimatily and formally purchased from the citizen Lazaro Peña the tract of land of the "Agua Caliente" to which the preceding approval of the departmental assembly of Alta California has reference; I grant and transfer all the right which I have in the land mentioned to Don Andres Hoeppener, who shall make such use thereof as may be most convenient to him. And for the necessary purposes and uses I give this at Sonoma, this 12 day of August, 1846.

"'M. G. VALLEJO.

"'Witness:

"'A. A. HENDERSON,

"'*Ass't Surgeon, U. S. Ship Portsmouth.*

"'JACOB P. LEESE.'

"It was at the time admitted that Legaro Peña had previously executed a deed of the tract to M. G. Vallejo, bearing date December 4, 1839, and that at the time the said deed from Vallejo to Hoeppener was executed the said Hoeppner received full possession of the premises from Vallejo, and continued thereafter in said possession until the land was sold by him.

"The counsel for plaintiff objected to the reception of this document in evidence because the same did not convey any estate from Vallejo to Hoeppener, but was a mere license to occupy, which terminated and was extinguished when Hoeppener asserted title to or attempted to convey the lands; which objection was overruled by the court and the
90 evidence admitted, to which ruling of the court counsel of the plaintiff duly excepted and his exception was noted.

"*3d exception.*

"The counsel for the defendants then, on the part of the defendant, George W. Whitman, offered in evidence a deed from Andres Hoeppener to Carlos Glein, dated Dec. 1st, 1847, together with various mesne conveyances, by which the title acquired by said Glein had passed to and rested in said Whitman. In said deed from Hoeppener to Glein the land intended to be conveyed is described as follows:

"'All that certain tract and parcel of land containing three hundred acres, more or less, being a portion of the rancho named Agua Caliente, as transferred to the said Andres Hoeppener to M. G. Vallejo; the said three hundred acres being more particularly bounded and described as follows, to wit: On the west side by Sonoma Creek, on the east side by the Napa Hills, on the north by Yeltan's farm, and on the south by the land of Earnest Rufus.'

"Defendants' counsel then proved, on the part of said defendant,

claim never was presented to the board of U. S. land commissioners for confirmation.

"The expediente & the translation thereof are hereto annexed marked A & B, and made part of this statement.

"4. The plaintiff at the same time offered in evidence a deed from the said Ignacio Pacheco to the plaintiff's grantor, M. G. Vallejo, dated December 7th, 1852, duly acknowledged and recorded on the same day in the county recorder's offce, Sonoma County, purporting to convey the whole of said Rancho Agua Caliente.

"The defendants objected to the admissibillity of this concession and deed in evidence, and the court refused to receive them, to which ruling and exclusion the plaintiff excepted and the exception was duly noted.

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"8. Also a deed from Mariano G. Vallejo to Emil Steinbach, the plaintiff, dated February 5, 1854, duly acknowledged and recorded December 3d, 1864, in the county recorder's office, Sonoma County.

"All the foregoing cover the entire ranch.

"The plaintiff proved by Charles C. Tracy the boundaries of the tract of land, and by T. M. Leavenworth that the defendants were respectively in possession of so much thereof as is described in their respective answers on file, and it was admitted they occupied adversely.

"The plaintiff here rested his case.

"The defendants then offered to show title in themselves derived ftom Lagaro Peña.

"*1st exception.*

"The plaintiff objected to the reception of such evidence on the ground that such evidence tended only at the most to make an equitable title in the defendants; that no such defence had been set up in the answer, nor could such defence be made in an action of ejectment; therefore that such evidence was incompetent, immaterial, and irrevelant. The court overruled the objection, to which ruling of the
88 court plaintiff duly excepted, and which exception was duly noted.

"*2nd exception.*

"The defendants Martha C. Watriss, George E. Watriss, George W. Whitman, Charles V. Stewart, and Jacob B. Warfield then proceeded to offer evidence to connect themselves with the plaintiff's grantor, M. G. Vallejo, and for this purpose they offered in evidence a paper writing, the execution whereof was duly proved, which is endorsed on the expediente to Lagaro Peña, and which is in the words and figures following:

"'Que suscriba certifica que habiendo comprad resp't'e'ma y formalo-m'to al C. Lazaro Peña el terreno de la Agua Caliente, agui se repecalla

ant 'e aprobacion de la asamblia departmental de la Alta Calif'a ; cedo y transparo todas los derechos que tengo al mencionadas terrenos en faber de D'a Andres D. Hoeppener, quien hara del el uso que mas le convenga y para los finis y usos necess's day este en Sonoma á 12 de agoste de 1846.

"'M. G. VALLEJO.

"'Testigo :

"'A. A. HENDERSON,

"'*Ass't Surgeon, U. S. Ship Portsmouth.*

"'JACOB P. LEESE.'

"And of which the following is a correct translation :

89 "'The undersigned certifies that he legitimatily and formally purchased from the citizen Lazaro Peña the tract of land of the "Agua Caliente" to which the preceding approval of the departmental assembly of Alta California has reference ; I grant and transfer all the right which I have in the land mentioned to Don Andres Hoeppener, who shall make such use thereof as may be most convenient to him. And for the necessary purposes and uses I give this at Sonoma, this 12 day of August, 1846.

"'M. G. VALLEJO.

"'Witness :

"'A. A. HENDERSON,

"'*Ass't Surgeon, U. S. Ship Portsmouth.*

"'JACOB P. LEESE.'

"It was at the time admitted that Legaro Peña had previously executed a deed of the tract to M. G. Vallejo, bearing date December 4, 1839, and that at the time the said deed from Vallejo to Hoeppener was executed the said Hoeppner received full possession of the premises from Vallejo, and continued thereafter in said possession until the land was sold by him.

"The counsel for plaintiff objected to the reception of this document in evidence because the same did not convey any estate from Vallejo to Hoeppener, but was a mere license to occupy, which terminated and was extinguished when Hoeppener asserted title to or attempted to convey the lands ; which objection was overruled by the court and the
90 evidence admitted, to which ruling of the court counsel of the plaintiff duly excepted and his exception was noted.

"*3d exception.*

"The counsel for the defendants then, on the part of the defendant, George W. Whitman, offered in evidence a deed from Andres Hoeppener to Carlos Glein, dated Dec. 1st, 1847, together with various mesne conveyances, by which the title acquired by said Glein had passed to and rested in said Whitman. In said deed from Hoeppener to Glein the land intended to be conveyed is described as follows:

"'All that certain tract and parcel of land containing three hundred acres, more or less, being a portion of the rancho named Agua Caliente, as transferred to the said Andres Hoeppener to M. G. Vallejo ; the said three hundred acres being more particularly bounded and described as follows, to wit : On the west side by Sonoma Creek, on the east side by the Napa Hills, on the north by Yeltan's farm, and on the south by the land of Earnest Rufus.'

"Defendants' counsel then proved, on the part of said defendant,

George W. Whitman, that said Carlos Glein, at the time of his said purchase from Hoeppener, took possession of the tract thus conveyed, (and which is the same tract held and possessed by said Whitman,) and that said Carlos Glein, together with all his successive grantees, including said Whitman, at the date of their respective conveyances, paid a valuable consideration therefor, and took possession of said tract, and
91 remained in the open and notorious possession of the same until they parted with their interests therein; but that said Whitman has never parted with his interest therein; and that, at the date of the conveyance from M. G. Vallejo to Emil Steinbach of his interest in the Agua Calliente rancho, said George W. Whitman was in the open and notorious possession of said tract, and claiming to own the same:

"The plaintiff's counsel objected to the admission of this deed in evidence, because it did not import to convey the title to any particular tract of land; that it created no legal estate, and was therefore incompetent evidence to prove any issue made in this action, and was irrelevant and immaterial.

The court overruled the objection, and admitted the evidence; to which ruling of the court counsel of the plaintiff excepted, and the exception was duly noted.

"*Fourth exception.*

"Counsel for the defendants then, on behalf of the defendant Wattriss, offered a deed from Andrew Hoeppener to J. Jacob Dopken, dated Nov. 14, 1846, together with various mesne conveyances, by which the title acquired by said Dopken had passed to and vested in said Martha C. Wattriss. In said deed from Hoeppener to Dopken the land intended to be conveyed is described as follows: 'One mile square of land,
92 English measure, containing six hundred and forty acres, situated, lying, and being in the district of Sonoma, and being part and parcel of all that certain tract of land called Agua Calliente, formerly taken up by Lazaro Peña, by a grant from the government, and lately purchased from the said Lazaro Peña by Mariana Guadaloupe Vallejo, and granted by the said Mariana Guadaloupe Vallejo unto the aforesaid Andrew Hoeppener, together with all and singular the advantages, profits, privileges, and appurtenances whatsoever, right, title, and interest of the said Andrew Hoeppener of, in, and to the same, belonging, or in any way pertaining.'

"Defendants' counsel then proved, on the part of said defendant Martha C. Watriss, that said Dopken, at the time of his said purchase from Hoeppener, took possession of the tract thus conveyed, (and which is the same tract held and possessed by said Martha, and described in her answer herein,) and that said Dopken, together with all his successive grantees, including said Martha, at the date of their respective conveyances, took possession of said tract, and remained in the open and notorious possession of the same until they parted with their interests therein, but that said Martha has never parted with her interest therein; and that, at the date of the conveyances from M. G. Vallejo to Emil Steinbach of his interest in the Agua Calliente rancho, said Martha C. Wattriss was in the open and notorious possession of said tract, and claiming to own the same.

93 "To the admission of which deed the counsel for the plaintiff objected that the said deed, by reason of the indefiniteness of the said description, was insufficient to convey title or to create any legal estate; it was therefore irrelevant, immaterial, and inadmissible, which

objection the court overruled, and admitted the deed in evidence, in connection with the testimony as to the occupation of the particular premises, to which ruling the counsel for the plaintiff then and there excepted, and his exception was duly noted.

"After the defendants had closed their testimony, the plaintiff's counsel offered to prove, by statements made by Andres Hoeppener in 1848, that Hoeppener and Vallejo agreed that Hoeppener should teach Vallejo's family music, for which Vallejo was to convey him the rancho. In the mean while Hoeppener was to occupy it; that neither Hoeppener nor Vallejo intended or considered said instrument as a conveyance, or more than a license to occupy; that Hoeppener did not perform his agreement, but, after part performance, abandoned it, and admitted that he had no claim to the land. All which took place in the year 1847–1848. The court refused to receive any testimony as to statements of Hoeppener subsequent to the date of his conveyances to others, and excluded the testimony; to which ruling of the court the counsel of the plaintiff then and there duly excepted, and his exception was duly noted.

"And inasmuch as the said matters do not appear by the record of
94 the proceedings in said cause, the judge, before whom said cause was tried, hath hereunto set his hand, at the request of the plaintiff, this fourth day of September, A. D. one thousand eight hundred and sixty-six.

"STEPHEN J. FIELD,
"*Circuit Judge.*"

Filed Sept. 28, 1865.

GEO. C. GORHAM, *Clerk.*

At a stated term of the circuit court of the United States, for the State of California, held at San Francisco on Monday, the 8th day of July, 1867:

Present, Hon. Stephen J. Field, judge.

EMIL STEINBACH
v.
CHARLES V. STUART ET AL.

And now, at this day, the motion for a new trial coming on to be heard, the same is argued and submitted, and by the court overruled and denied.

95 EXHIBIT "A."

JURISDICCION DE SONOMA:

Espediente promovido en solicitad del parage conocido con el nombre Agua Caliente por Ygnacio Pacheco.

165.

Sello tercero, dos reales. Habilitado provisionalmente por la administracion de la aduana maritima de Monterey de la Alta California para los años de mil ochocientos treinto y cuatro y mil ochocientos treinta y cinco.

ANGEL RAMIRES.

MONTEREY, *En'o 22de*, 1836.

De conformidad con los leyes y reglm'tos de la materia, informa al ayuntamiento de S'n Fran'co si el contenido en esto instancia obtiene los requisitos prevenidos en la ley de 28 de agosto de 1824, para ser atendido á la solicitud del terreno q'e pretende está
96 comprendido en las 20 leguas limitrofes o 10 litorales si es de regadio temporal o abrebadero si pertenece á la propriedad de alyun particular corporacion ó pueblo o si es de regadio temporal o abrebedero. Evacuadas estas diligencias pasara al mayordomo de San Fran'co p'a q'e esponga lo q'e crea conveniente. El S'r D'n Nicolas Gutierrez, ten'te coron'l, comandante g'ral, inspector y gefe politico de la Alta California, asé lo mandó decretó y firmó de q'e doe fié.

NICHOLÁS GUTIERREZ.

F'CO DEL CASTILLO NEGRETE,
S'rio.

S'r Gefe Sup'r Politico Ygnacio Pacheco cabo de la comp'a de caballe'a perm'te de S. Fran'co ante V. S. como mejor convenga á mi decreto digo, que siendo poseedor de concederable num'o de ganado bacano y caballar y careciendo de un terreno propio para asegurar mi subsistencia y lade mi familia, solicito a V. S. se sirva concederme el que va marcado en el diseño adjunto, conocido con el nombre de Agua Caliente; este terreno colinda con el pueblo de Sonoma p'r el rumbo del este, y por el sur con elde Petaluma y el estencion es de una legua cuadrada o un sitio de ganado mayor. Por lo espuesto A. V. S. suplico se sirva acceder a esta mi solicitud sé lo hallare en justicia de lo que recibiré gracia. Juro no ser de malicia, &c.

Sonoma, 30 de Dic're de 1835.

YGNACIO PACHECO.

97 S'or gefe sup'or politico:

En cumplimiento de lo prevenido p'r el sup'or decreto f'ha 22 de en'o del presente año q'e se halla en la presedente solicitud q'e hace el C. Ygnacio Pacheco del terreno nombrado Agua Caliente; el ayuntamiento de esta demarcacion dice lo siguiente; que el interesado obtiene los requisitos necesarios para ser atendido al terreno que pretende no esta comprendido en las 20 leguas limitrofes y si en las 10 litorales; es de regadió temporal y poco abrevadero, d'ho parage lo o cupaba la mision de S. Solano q'e en la actualidad ignora este ayuntamiento si estara ocupado p'r aquel pueblo p'r lo q'e es de parecer informe el comisionado o mayordomo de Sonoma.

Pueblo de San Francisco de Asis, marzo 11 de 1836.

JOSÉ JOAQUIN ESTUDILLO.
FRAN'CO SANCHEZ.

98 (Here follows map marked page 98.)

99 Administracion de San Fran'co de Asis.

Con f'ha 11 de marzo, me remitio el s'or alcalde del pueblo de San Francisco estos dos espedientes p'a informe segun el superior decreto que se halla al margen de d'ho esp's, y como yo no tengo cono cemiento de esos terrenos por no pertenecer á la de mi cargo, y sabedor de q. pertenecer á esa ex mision de S. Solano solo V. puede informar acerca de lo espuesto, en virtud de ser un ad'or de ello.

Dios y libertad. Pueblo de Dolores, 18 de abril de 1836.

GUM'DO FLOREZ.

S'or ad'or de San Solano.

El administrador de San Fran'co de Asis con oficio de fecha 16 del corriente acompaña los dos espedientes promovidos p'r los ciudadanos Ygnacio Pacheco y Nicholás Higuera p'a q'e informe segun, lo pide
100 en su oficio sitado y para facilitar el curso de ellos diré que los terrenos q'e solicitan no estan ocupados ni p'r los naturales de esta pueblo ni p'r el fondo ó semovientes q'e estan á mi cargo, pues a quellos tienen lla sus ranchos establecidos de comun y este ocupa desde el parage de Soscol asta el estrecho de Carquinas son mesclado lo cua. por su lo calidad; por respetibo á las personas q. solicitan obtienen los requisitos para y los terrenos no estan comprendidos en las 20 leguas limitrofes si en las diez litorales q'e espresa la lei de 18 de agosto de 1824, hapesar de que asi lo informa el ilustre ayuntamiento de S. Fr'co de Asis.

Los tres documentos adjuntos dichos tengo de acompañar de ácompañor a V. S. p'a los fines q'e convengan.

Dios y libertad. Abril 24 de 1836.

ANTONIO ORTEGA.

So'r gefe superior y politico de la Alta California.

101 S. Fran'co de Asis marzo 11 de 1836.

JOSE JOAQ'N ESTUDILLO.
FRAN'CO SANCHEZ.

MONTEREY, *Mayo 7 de* 1836.

Vista la peticion con que da principio esta espediente el informe del ayuntam'to de S. Francisco de Asis el de los administradores de las misiones de S. Solano ó S. Francisco con todo lo demas que se tuvo presente y ver convino de conformidad con lo dispuesto por las leyes y reglamentos de la materia se declara al C. Ygnacio Pacheco dueño en propriedad del terreno nombrado Agua Caliente sugetandose a las condiciones que estipularen. Librese el despacho correspondiente, tomese razon de el en el libro respectivo y reservese el espediente para la aprovacion de la E. D'n Territorial, El S. D. Mariano Chico, gefe superior politico de la Alta California asi lo mando decreto y firmo de lo que certifico.

MAR'O CHICO.
FRAN'CO DEL CASTILLO.
NEGRETE, *S'rio.*

102 En sesion de 31 de mayo pasó á la comision de terrenos valdios.

MALDONADO, *S'rio.*

EX'MO S'OR: La comision de terrenos valdios a quienes se paso el esped'te q'e se mando practicar a peticion del ciud'o Ygnacio Pacheco del paraje nombrado Agua Caliente lo han examinado con la circumspeccion q'e corresponde teniendo al mismo tiempo presente la ley de 18 de agosto de 824 y las disposiciones generales q'e en 24 de no'bre de 1828, dicto el supremo gobierno de la union para el mejor cumplim'to de lo prevenido. Por lo d'ho conclaye la comision apreciendo a la deliberacion de V. E. la sig'te proposicion.

Se aprueba la consecion hecho al ciuda'o Ygnacio Pacheco del parage nombrado Agua Caliente consedido en 7 de mayo de este año de entera conformidad con lo prevenido en la ley de 18 de agosto de 1824 y el ag'sto 5 del reglamento de 21 de novembre de 1828.

103 Monterey, 1° de julio de 1836.

JOSÉ JOAQUIN GOMEZ.
JOSÉ ANT'O DE LA GUERRA Y CARILLO.

MONTEREY, *Julio* 19 *de* 1836.

En sesion de este dia aprovó la E. junta departmental la unica proposicion en q'e concluyo el antecedente dictamen y se mandó pasar el espediente al S. gefe politico para su conducion.

JUAN B. ALVARADO, *Presidente.*
JOSÉ MARIA MALDONADO, *S'rio.*

MONTEREY, *Julio* 22 *de* 1836.

En vista de la aprovacion otoryada por la ex'mo junta departmental el diez y nueve del presente, libresé testimonio de ella y de este decreto á la parte de Ygnacio Pacheco, si lo solicitare en confirmacion á la consecion del terreno llamado Agua Caliénte que obtubo en siete de mayo de este presente año. El S. D. Mariano Chico, gefe superior politico de este Alta California así lo mandó, decretó y firmo de
104 lo que certifico.

M. CHICO.

Office of the surveyor general of the United States for California.

I, E. F. Beale, surveyor general of the United States for the State of California, and as such, having in my office, and in my charge and custody, a portion of the archives of the former Spanish and Mexican territory, or department of Upper California, as also the papers of the late board of commissioners, to ascertain and settle the private land claims in California, by virtue of the power vested in me by law, do hereby certify that the 13 preceding and hereunto annexed pages of tracing paper, numbered from one to 13 inclusive, exhibit a true, full, and correct copy of original expediente on file in said archives, endorsed:

De Sonoma, espediente promovido en solicitad del parage conocido con el nombre de Agua Caliente por Ygnacio Pacheco, 165.

105 In testimony whereof I have hereunto signed my name officially, and caused my seal of office to be affixed, at the city of San Francisco, this 13 day of Feb'y, 1864.

[SEAL.]

E. F. BEALE,
U. S. Surveyor General for California.

106 EXHIBIT B.

JURISDICTION OF SONOMA:

Expediente instituted by Ignacio Pacheco petitioning for the place known by the name of "Agua Caliente."

165.

Petition.

Third seal, two reales. Provisionally authorized by the maritime custom-house of Monterey, of Alta California, for the years 1834 and 1835.

ANGEL RAMIREZ.

CASTRO.

Ygnacio Pacheco, corporal of the cavalry company of San Francisco, before your honor in due form of law, represents, that being possessor of a considerable number of cattle and horses, and being in want of a piece of land to secure the subsistence of himself and family, he prays that your honor be pleased to concede to him that which is designated on the accompanying diseño, known by the name of "Agua Cali-

107 ente;" this land bounds with the pueblo of Sonoma, by the rancho of the east, and on the south with that of Petaluma, and it is of the extent of one square league, or one sitio de ganado mayor.

Wherefore he prays that your honor be pleased to accede to this his petition, if you should find the same in accordance with justice, in which he will receive favor, swearing that he proceeds in good faith, &c.

Sonoma, December 30th, 1835.

YGNACIO PACHECO.

Marginal decree.

MONTEREY, *January* 22, 1836.

In conformity with the laws and regulations on the subject, let the ayuntamiento of San Francisco report if the petitioner in this case possess the requisites of the law of the 28th of August, 1824, to entitle him to be heard on his petition; if the land petitioned for is comprehended within the twenty leagues limitrofes, or the ten litorales; if it is irrigable, arable, or suitable for pasturage; if it belongs to any individual,
108 corporation, or pueblo. When these proceedings shall have been taken, let the expediente be forwarded to the mayordomo of San Francisco, that he may report what he may think proper. The Senor Don Nicolas Gutierrez, lieutenant colonel, comandante general, insector, and superior political chief of Alta California, thus ordered, decreed, and signed, which I attest.

NICOLOS GUTIERREZ.

FRAN'CO DEL CASTILLO NEGRETE, *Sec'y.*

Señor superior political chief:

In compliance with the requirements of the superior decree of the 22d of January of the present year, which is found upon the foregoing petition, made by Ygnacio Pacheco, for the land named "Agua Caliente," the ayuntamiento of this demarcation reports as follows: that the petitioner possesses the requisites to entitle him to be heard; that the land petitioned for is not comprehended in the 20 leagues limitrofes,
109 and that it is comprehended in the 10 leagues litorales; that it is irrigable and arable, and a small portion of it suitable for pasturage; and that said place has been occupied by the mission of San Solano, but that this ayuntamiento does not know if said land is at present occupied by that pueblo; wherefore it is of opinion that the commissioner or mayordomo of Sonoma should report.

Pueblo of San Francisco de Asis, March 11th, 1836.

JOSÉ JOAQUIN ESTUDILLO.
FRAN'CO SANCHEZ.

Administration of San Francisco de Asis.

Of the date of the 11th of March last, the señor alcalde of the pueblo of San Francisco de Asis transmitted to me these two expedientes for my report upon the same in accordance with the superior decree found upon the margin of the same; and as I have no knowledge of these lands, they not being within my jurisdiction, and know-
110 ing that they pertain to that ex-mission of San Solano, you alone can report in relation to the same, since you are administrator thereof.

God and liberty. Pueblo of Dolores 16th of April, 1836.

GUME'DO FLORES.

S'or Adm'r of San Solano.

The administrator of San Francisco de Asis, with an official communication dated the 16th of the present month, forwarded me two expedientes, instituted by the citizens Ynacio Pacheco and Nicolas Higuera, that I might report upon the same; and to facilitate the proceedings in relation to the same, I say that the lands petitioned for are not occupied neither by the natives of this pueblo, nor by the stock under my charge, since those (the Indians) have already their ranchos established in common, and this (the stock) occupies from the ranchos of Suscol as far as the straits of Carquinas, without any mixing whatever; in rela-
111 tion to the petitioner, they possess the requisites to entitle them to be heard; that the lands are not comprehended within the 20 leagues limitrofes, or within the 10 litorales mentioned in the law of the 18 of August, 1824, notwithstanding the report of illustrious ayuntamiento of San Francisco de Asis.

The three said accompanying documents I have the honor to transmit to your honor for the necessary ends.

God and liberty. Sonoma, April 24th, 1836.

ANTONIO ORTEGA.

To the señor superior political chief of Alta, California.

MONTEREY, *May 7th*, 1836.

In view of the petition with which this expediente commences, the report of the ayuntamiento of San Francisco de Asis, that of the administrator of the missions of San Solano alias San Francisco, with all other matters necessary to be considered, in conformity with the laws and regulations governing the matter, the citizen Ignacio Pa-
112 checo is declared owner in property of the land named "Agua Caliente," subject to the conditions that may be stipulated. Let the corresponding title issue, and let registry be made of it in the proper book, reserving the expediente for the approval of the most excellent territorial deputation. The Señor Don Mariano Chico, superior political chief of Alta California, thus ordered, decreed, and signed, which I certify.

MAR'O CHICO,
F'CO DEL CASTILLO NEGRETE, *Sec'y.*

MOST EXCELLENT SEÑOR: The committee on vacant lands, to which was referred the expediente upon the petition of Ignacio Pacheco for the land named "Agua Caliente," have examined the same with the necessary care in view of the law of the 18th of August, 1824, and the general dispositions of the 28th of November, 1828, dictated by the supreme government for the better fulfilment of the first. In considera-
tion of which the committee offers for the consideration of your
113 excellency the following proposition: The concession made to the citizen Ygnacio Pacheco of the place named "Agua Caliente," on the 7th of May of this year, in entire conformity with the law of the 18th of August, 1824, and article 5 of the regulations of the 21st of November, 1828, is approved.

Monterey, July 10th, 1836.

JOSÉ JOAQUIN GOMEZ.
JOSÉ ANT'O DE LA GUERRA Y CARRILLO.

MONTEREY, *July 19th*, 1836.

In the session of to-day the excellent departmental junta approved the proposition with which the foregoing report concludes, and ordered

the expediente to be passed to the superior political chief for its conclusion.

JUAN B. ALVARADO.
JOSÉ M'A MALDONADO, *Sec'y.*

MONTEREY, *July 22d*, 1836.

In view of the approvation by the most excellent departmental
114 junta, on the 19th inst., let a copy of the same, and of this decree, be given to Ygnacio Pacheco, if he should ask it, in confirmation of the concession of the land called "Agua Caliente," which he obtained on the 7th of May of the present year. The Señor Don Mariana Chico, superior political chief of this Alta California, thus ordered, decreed, and signed, which I certify.

M. CHICO.

Translated from the original on file in the office of U. S. sur. gen'l's office by R. C. Hopkins.

115 EXHIBIT C.

Espediente promovido por el ciudadano Lasaro Piña en pretencion del terreno conocido con el nombre conocila Agua Caliente.

229.

Ex'mo s'or gobernador:

Visto lo contenido en esta instancia y el parecer del s'or co'mand'te general, elevese al ex'mo s'or gob'or del departamento ante quien por via de informe esponya. Que el interesado en esta solicitud obtiene los requisitos leyales ser atendido y que el terreno que pretende se halla baldio y puede ser le concedido en propiedad dejandolo á la deliveralidad de V. E.

San Juan de Castro, 9 de
116 julio de 1840.

JOSÉ M'A VILLA'VO.

S'or prefecto del 1er distrito en la Alta California:

Lazaro Pina, Mejicano por nacimiento sargento 2° de artilleria y residente en este departamento la veinteun años, ante V. S. como mas halla lagar de denecho, digo. Que habiendoseme concedido por el s'or comandante general, (a reserva de solicitor del gobernador los titulos de estilo como consta del documento que a compaño,) el terreno conocido con el nombre de la Agua Caliente, y deseando para mi mayor resguardo y segaridad, recabar la propiedad del citado terreno cayo diseño tambien acompaño: A. V. S. suplico se sirba prover en justicia a fin de que me sea librado por el gobierno del departamento el titulo de propiedad del terreno que solicito, sirviendose admitirme esta en papel comun por no haber en este punto del sello que corresponde juro lo necesario, &c.

Sonoma, junio 25 de 1840.

LAZARO PINA.

SONOMA, *Octubre* 13 *de* 1839.

Se concede al inte resado el terreno que solicita a reserva de solicitar del gob'o politico los titulos de estilo.

M'NO G. VALLEJO.

S'or comand'te g'ral:

Lazaro Piña, sargento 2o de artilleria permanente ante V. S. con el debido respeto y en la mejor forma me presento y digo. Que hallandome con numerosa familia,

y teniendo alyunos bilenes de campo caresco de un terrero en que poder
radicarme para aseyarar en lo futuro la precisa subsistencia en
117 cuanto me sea posible ; para cuyo efecto he registrado y solicito
un terreno de la estencion de dos leguas y media y un cuarto de legua de ancho, conocido con el nombre de la Agua Caliente situado de N. E. de San Solano, lindando al sudueste con el arroyo que separa la propiedad del S'or Comand'te G'ral D'n Mariano Guadalupe Vallejo, de sudeste con la poblacion de Sonoma, de norte con la lomas y cerros que median y dividen el rancho de Jorge Yount, y al nordeste con el rancho de Don Juan Willson : por lo tanto A. V. S. suplico se sirva acceder á mi solicitud en lo que recibiré merced y gracia. Juro no ser de malicia y lo necesario, &c.

Sonoma, octubre 14 de 1839.

LAZARO PIÑA.

Por no haber papel sellado, viene en comun.

118 (Here follows map marked page 118.)

119 MONTEREY, 13 *de Julio de* 1840.

Vista la peticion con queda principio este expediente, el parecer del S. comand'te g'ral y el informe del S. perfecto del 1er distrito, con todo lo demas que se tuvo presento y ver convino de conformidad con las leyes y reglamentos de la materia declaro al ciud'no Lazaro Piña dueno en propiedad del parage conocido con el nombre de Agua Caliente, colindante al sudeste con el arroyo del rancho de Petaluma; al S. E. con el pueblo de Sonoma; al N. con las lomos y cerros que median y dividen al rancho de Jorge Yount y al N. O. con el rancho de Don Juan Wilson.

Librese el despacho correspondiente tomese razon en el libro respectivo y derijase este espediente á la ex'mo junta departmental para su aprovacion.

EX'MO S'OR: La comision de terrenos baldios ha visto con el nesesario deliveramiento el espediente promovido por c'o Lazaro Piña en
120 pretencion del paraje conocido por de "la Agua Caliente" y no existe en todo él otro docum'to q'e indique la estencion del paraye d'bosino la solicitud del interesado, pues el diseño q'e corre en el referido espediente no se halla sujeto a escala alguna y el decreto de concesion no espresa la cantidad de sitios de que fue hecha la consecion funda su dictamen de aprobacion en solo la estencion solicitada q'e es de dos y media leguas de largo y un cuarto de legua de ancho, pues no es de suponerse haya agraciado el gob'o al interesado en mayor estencion q. la solicitud y por consig'te la comision somete á la decision de V. E. la proposicion siguiente.

Se aprueva la consecion hecha por el sup'r gob'o del depart'o, con f'ha 13 de julio de 1840, en favor del c'o Lazaro Piña del parage de la Agua Caliente en estencion de dos y media leguas de largo y un cuato de legua de ancho.

Sala de comision, Angeles, octubre 7 de 1845.

FRAN'CO DE LA GUERRA.
NARCISO BOTELLO.

121 El S'or Don Juan B. Alvarado, gob'dor constitucional del departmento de los Californias, asé lo mandó, decretó y firmo doy fié.

ANGELES, *Octubre* 3 *de* 1845.

Dada cuenta en sesion de hoy con este espediente á la ex'mo asamblea departamental de mando pasa á la comision de terrenos valdios.

PIO PICO, *Presid'te*,
AGUSTIN OLVERA, *S'rio.*

EXHIBIT D.

ANGELES, *Octubre* 8 *de* 1845.

En sesion de hoy se aprovó por la ex'mo asamblea departamental la proposicion del dictamen presedente mandando se de vuelva al E. S. gobernador para los fines convinientes.

PIO PICO, *Presid'te.*
AGUSTIN OLVERA, *S'rio.*

En la fecha se libro á la parte la copia respectiva.

122 *Translation of Exhibit C.*

Espediente instituted by the citizen Lasaro Peña petitioning for the tract of land known by the name conocila, Agua Caliente.

229

These two words, cono cila, to be found in the traced copy from which this translation is made, are evidently written by mistake, and are superfluous.

Most excellent Mr. Governor:

Having seen the contents of this application and the opinion of the commandant general, let it be carried up to the most excellent governor of the department, before whom, by way of report, I make known that the party interested in this petition possesses the legal requisites entitling him to be
123 heard, and that the land which he applies for is vacant, and can be granted to him as owner, leaving it to your excellency's deliberation.

San Juan de Castro, 9th of July, 1840.

JOSÉ M'A VILLA'A.

Mr. prefect of the 1st district of Upper California:

I, Lazaro Peña, a Mexican by birth, second sergeant of the permanent artillery, and a resident of this department for twenty-one years, before your lordship, as may be most in accordance with law, represent: that there having been granted to me by the commandant general, (with reservation of soliciting from the government the usual titles, as appears from the document which I annex,) the tract of land known by the name of the Agua Caliente, and wishing for my greater protection and security to acquire the ownership of the said land, the sketch whereof I also annex, I pray your lordship will be pleased to make such lawful provision that the title of ownership of the land for which I petition may be issued to me by the government of the department, having the goodness to receive this upon common paper, as there is none of the proper stamp to be had at this place.

I make the necessary oath, &c.

Sonoma, June 25th, 1840.

LAZARO PEÑA.

124 SONOMA, *October 13th*, 1839.

Concession is made to the party interested of the land he applies for, with reservation of petitioning from the political government the usual titles.

MARIANO G. VALLEJO.

Mr. Commandant General:

I, Lazaro Peña, second sergeant of permanent artillery, before your lordship with due respect, and in all proper form, present myself and say: That finding myself with a numerous family, and having some field property, bienes de campo, I am in want of a piece of land where I can settle myself, in order to secure so far as may be possible for me, the necessary subsistence for the future. To this end I have examined, and do petition for, a tract of land of two leagues and a half in extension, and a quarter of a league in width, known by the name of the "Agua Caliente," situated to the northwest of Saint Solano, bordering on the southwest with the rivulet, arroyo, which separates the property of Mr. Commandant General Don Mariano Guadalupe Vallejo; on the southeast with the town of Sonoma; on the north with the hills and mountains which intervene and separate the rancho of George Yount; and on the northwest with the
125 rancho of Mr. John Wilson. Therefore I pray your lordship will be pleased to accede to my petition, in which I shall receive benefit and favor.

I swear it is not in bad faith, and whatsoever is necessary, &c.

Sonoma, October 14th, 1839.

LAZARO PEÑA.

In the absence of stamped paper this comes upon common.

(Here follows map which appears in the Spanish grant.)

126 MONTEREY, 13*th July*, 1840.

The petition with which this espediente is commenced, the opinion of the commandant general, and the report of the prefect of the first district having been seen, together with everything else which was considered and proper to observe, in conformity with the laws and regulations upon the matter, I declare the citizen Lazaro Peña to be the owner in proper right of the place known by the name of Agua Caliente, conjoining on the southwest with the rivulet, "arroyo" of the rancho of Petaluma, on the southeast with the town of Sonoma, on the north with the hills and mountains which intervene and separate the rancho of George Yount, and on the northwest with the rancho of Mr. John Wilson.

Let the suitable warrant issue, account thereof be taken in the proper book, and let this espediente be directed to the most excellent departmental junta for its approval.

Mr. John B. Alvarado, constitutional governor of the depart-
127 ment of the Californias, so ordered, decreed, and signed the same, I certify.

Angeles, October 3rd, 1845.

Report having been made upon this espediente in to-day's session of the most excellent departmental assembly, it was ordered to be passed to the commission on vacant lands.

PIO PICO, *Pres'd't.*
AGUSTIN OLVERA, *Sec'y.*

MOST EXCELLENT SIR: The commission on vacant lands has examined, with all the deliberation necessary, the espediente instituted by

the citizen Lazaro Peña, petitioning for the place known by the name of the Agua Caliente, and as there does not appear in it anywhere other document which indicates the extent of the place mentioned than the petition of the party interested, for the sketch making part of the said espediente is not made to conform to any scale whatsoever, and
128 the decree of concession does not express the number of leagues—sitios—of which it was composed, the commission founds its opinion of approval upon solely the extent petitioned for, which is of two and a half leagues in length, and a quarter of a league in breadth, for it is not to be supposed that the government has favored the party interested with a greater extent than that petitioned for, and therefore the commission submits for the decision of your excellency the following proposition:

Approval is given to the grant made by the superior government of the department, under date 13th July, 1840, in favor of the citizen Lazaro Peña, of the place called the Agua Caliente, in extent of two and a half leagues long and a quarter of a league wide.

Commission chamber, Angeles, October 7th, 1845.

FRANCISCO DE LA GUERRA.
NARCISO BOTELLO.

Translation of Exhibit D.

ANGELES, *October 8th*, 1845.

At this day's session the most excellent departmental assembly
129 approved the foregoing proposition of the opinion, ordering that the original espediente be returned to his excellency the governor for the convenient purposes.

PIO PICO, *President.*
AGUSTIN OLVERA, *Sec'y.*

At this date the respective copy was issued to the party interested.

(Endorsed:) Filed 24 September, 1865.

GEO. C. GORHAM, *Clerk.*

130 State of California, county of San Francisco.

EMIL STEINBACK
vs.
CHARLES V. STEWART ET AL.

Writ of error from circuit court of the United States to the Supreme Court of the U. S., which case was tried & determined in the circuit court of the United States for the northern district of the State of California, at a term of the said court held in September, 1865.

And now comes the said Emil Steinbach, plaintiff in the above-entitled cause in the said circuit court, & also the plaintiff in this writ of error, to the Supreme Court of the United States, & by his attornies, B. S. Brooks and John Wilson, & states & assigns here the following errors, which were committed by the said circuit court upon & during the trial of the said cause, against & to the prejudice of the said plaintiff, & to which the said plaintiff duly excepted to at the trial thereof, & which exceptions were duly signed & sealed, & made a part of the record in the said cause at the trial thereof:

131 1st. That the said circuit court erred in allowing the said defendants against the objections & exception to give in evidence in their defence, showing a title direct from Lazaro Pena, the original grantee of the land sued for, to show title in them for the portions thereof that they possessed, because the said evidence could in them show at most an equity, if anything, and this equity, if showed, was no defence to the action.

2d. That the court erred in this, that the defendants were permitted, against the exception of the plaintiff, to give in evidence as a common source of their titles to the portions of the land sued for, to the portions thereof held by them, the paper signed & delivered by M. J. Vallejo to one Andres Hoepner, bearing date the 12th August, 1846, because at most it showed them to hold only an equity, & therefore not a defence in the said circuit court to this action.

3rd. There is error in this, that the said circuit court permitted, against the exception of the plaintiff then and there made, the said George W. Whitman to give in evidence a deed from Andres Hoepner to Charles Glein, bearing date 1st December, 1847, & the other papers offered therewith, as appears by the record, because it did not show on its
132 face, nor was there any evidence to show, boundaries to the land therein attempted to be conveyed.

4th. There is also error in this, that the said court did, against the objection & exceptions of the plaintiff, permit the defendant Martha Waters & her husband to give in evidence a deed from Andres Hoepner to Jacob Dopkin, dated the 14th of Nov., 1846, because the same, upon its face, showed no boundaries to the land thereby attempted to be conveyed, nor did it refer to other outside objects by which such boundaries could be identified.

5th. There is also error in this, that the said court refused to allow the said plaintiff to show and give evidence in rebuttal to that given as aforesaid by the several defendants; to show that even if these deeds, shown by the defendants from Hoepner, did show an equity in them, that Hoepner wholly failed to perform the conditions to the said Vallejo, upon which this semblance of an equity rested, & that therefore the equity avoided & null.

And, therefore, for these errors, pray the court to reverse the judgment of the said circuit court, & order judgment to be entered for the plaintiff; as in duty, &c.

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B. S. BROOKS,
JOHN WILSON,
Att'ys for Pl'ff in Error.

And now come the said defendants in the above-entitled cause, and admit that the citation issued upon the said writ of error has duly served on them, and that a proper bond has been filed and approved by the judge of the said circuit court for the said writ, and also that a copy of the errors filed and assigned by the said plaintiff has also been duly served on the defendants' attorney, E. D. Wheeler, who comes here and joins in the errors so assigned by the said plaintiff, and insists the circuit court did not commit any error in its rulings in any of the cases of which the plaintiff complains, and therefore prays that the said judgment may in all things be affirmed.

E. D. WHEELER,
Att'y for Defendants in Error.

Filed December 21st, 1868.

GEO. E. WHITNEY, *Clerk*,
Per H. F. LARDNER, *D. C.*

134 Circuit court of the U. S. for California.

EMIL STEINBACK
vs.
CHA'S V. STUART ET AL.

It is stipulate by the undersigned, attornies for the plaintiff & defendants, that the record on the writ of error in this cause shall be printed here; that the pl'ft will furnish the defendants' attornies a copy thereof, & also their opening brief, to which the defendants' attorney shall at once reply, & serve a copy on plaintiff's attornies, & they shall reply thereto, & that then the record itself, the necessary printed copies of the record, & the briefs of both parties, shall be forwarded at once to the clerk of the Supreme Court of the United States, & hereby the said clerk is authorized, if the rules of the said court will permit him to do so, to enter an order in open court directing this case to be at once submitted to the court for their decision upon the records & briefs without further agreement by either party, & to ask the decision of the said court thereon.

B. S. BROOKS,
JOHN WILSON,
Att'ys for Plaintiff in Error.

135 E. D. WHEELER,
Att'y for Defendants in error.

(Endorsed:) Filed Dec. 21st, 1868.

GEO. E. WHITNEY,
Per H. F. LARDNER, *D. C.*

UNITED STATES OF AMERICA, *District of California, ss:*

I, George E. Whitney, clerk of the circuit court of the United States for the district of California, hereby certify that the foregoing one hundred and thirty-five written pages are a true copy of the record and all proceedings in the cause mentioned in the annexed writ of error, and that the same constitute the return to the said writ.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, in said district, this seventh day of January, A. D. 1869, and of our independence the ninety-third.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

136 UNITED STATES OF AMERICA, *ss:*

To Charles V. Stewart, Jacob B. Warfield, George W. Whitman, and Martha C. Watris, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the first Monday of December, A. D. 1868, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein Emil Steinbach is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

August 26th, 1868.

STEPHEN J. FIELD,
Associate Justice Supreme Court of the U. S.

137 Received a copy of the within citation this 26th day of August, 1868, & accept the same as the attornies for the respondents in the writ of error, of which this is notice of its being issued,

E. D. WHEELER, *Def'ts' Att'y.*

(Indorsed:) United States Supreme Court. Emil Steinbach vs. Cha's V. Stuart et al. Citation.

Filed 30 December, 1868.

GEO. E. WHITNEY, *Clerk.*

138 In the Supreme Court of the United States.

EMIL STEINBACH
vs
CHARLES V. STEWART ET AL.

NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

John L. Green, being duly sworn, saith that he is a citizen of the United States; of twenty-one years of age and upwards; and knows the premises in controversy in this suit, and the value thereof, being those portions of the Rancho Agua Caliente, claimed and occupied by Charles V. Stewart, George W. Whitman, George E. Watriss and Martha C. Watriss, his wife, and Jacob B. Warfield, and he saith that each
139 of said parcels of land is worth upwards of [of] five thousand dollars.

JOHN L. GREEN.

Subscribed and sworn to before me this 2d day of December, 1869.
[SEAL.]

J. H. BLOOD,
Notary Public.

(Indorsed:) In the Supreme Court of the United States. Emil Steinbach vs. Charles V. Stewart et al. Affidavit of John L. Green as to value of premises.

(Indorsement on cover:) No. 441. Emil Steinbach, plaintiff in error, vs. Charles V. Stewart, Geo. W. Whitman, Martha C. Watriss, & Jacob B. Warfield. California C. C. U. S.
Filed 7th April, 1870.

NO. _____

In the Supreme Court of the United States.

EMIL STEINBACH,

Plaintiff in Error,

vs.

CHAS. V. STEWART ET AL.

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN WILSON,
Attorney for Plaintiff in Error.

Francis & Valentine, Printers, 517 Clay St., S. F.

IN THE

Supreme Court of the United States.

EMIL STEINBACH,
Plaintiff in Error,
vs.
CHARLES V. STEWART,
GEORGE W. WHITMAN,
MARTHA C. WATRISS, and husband,
JACOB B. WARFIELD,
Defendants in Error.

Writ of Error to the Circuit Court of the United States for the District of California.

This was an Action of Ejectment brought by the plaintiff in error against the above named defendants and many others, to recover the possession of the Rancho Agua Caliente, granted by the Mexican Government to one Lazaro Peña, and finally confirmed by the United States Board of Land Commissioners, under the Act of 1851, to Mariano G. Vallejo, by the District Court, in May, 1859, and finally by the Supreme Court, in December Term, 1861.

The plaintiff claimed title under a deed regular in form and properly executed and recorded, from the said Mariano G. Vallejo, the confirmee, to the plaintiff, dated February 5th, 1864, and proved that the defendants were occupying parts of the rancho adversely to him, at the commencement of this suit. The trial was by the Court, by consent of the parties, without a jury. (Transcript, folios 77 to 117.)

Complaint was in the usual form, alleging plaintiff's seizin in fee, the unlawful entry and ouster by defendants, and unlawful holding of the premises from the plaintiff.

Defendants by their several answers deny each allegation in the complaint, except so far as afterwards admitted—set up title in themselves, each for a particular piece of this rancho, by specific metes and bounds and adverse possession in themselves—also the Statute of Limitations, and disclaimed as to the balance of the rancho; and set up no other defense.

The plaintiff had judgment against all the defendants, except the defendants in this writ of error, who had judgment against the plaintiff, and this writ is brought to reverse this judgment, so obtained by those defendants.

I.

First error assigned, (folio 264.)
Second error assigned, (folio 268 to 269.)
Both these errors we propose to argue together.

The plaintiff, to support his claim, had put in evidence the expediente of the original concession to Lazaro Peña, by which it appeared that Peña presented his petition to the Commandant General for a concession of this land, on the 14th October, 1839, and that the Commandant General granted the land to him upon condition that he would apply to the Governor for a regular title. This act of the Commandant did not, could not, pass any title; at best, it only passed leave to possess for the present. (See Transcript, folio 80.)

In December, 1839, while the grant was in this condition, Peña sold and conveyed all his right in the land to M. G. Vallejo.

All that Peña had then, and all that he could pass to Vallejo, was the slightest equity.

In June, 1840, Peña petitioned the Governor in due form for a grant of the land.

On the 13th July, 1840, the Governor granted the land in full property to Lazaro Peña. Peña did not, nor did his heirs, present any claim to the Board.

M. G. Vallejo, in March, 1853, presented his claim to the Board of Land Commissioners, for confirmation to him of his title to the whole of said rancho, under the said grant made to Peña.

The Board rejected the claim; and, on an appeal, the District Court confirmed the same with a proviso, (folio 187, etc.); and, on appeal to the United States Supreme Court, this decree was affirmed in these words: "*In so far as it confirms the original "grant, be and the same is hereby affirmed.*" (Folio 199.)

This affirmation clearly vacates the proviso attached to the decree of the District Court, (see folio 191,) and confirms the land to Vallejo without any limitation whatever, (see the decree of the District Court, at folios 189 and 190.) The proviso of this District Court decree is done away with, and that part only is affirmed by which the original grant to Lazaro Peña was declared a valid grant and the land is confirmed to M. G. Vallejo, under whom the plaintiff in this action claims the land by a regular chain of title, beginning since the final action of the Supreme Court of the United States. By the terms of the decree, all the land is confirmed to Vallejo, and of course it could not be confirmed to a stranger to the proceedings; it must be confirmed to the petitioner, or rejected, and this is the clear and manifest intention of the law of 3d March, 1851, authorizing these confirmations or rejections. This decree operates as a release on the part of the United States to M. G. Vallejo of the legal title vested in the United States by the Treaty of Gaudalupe Hidalgo.

Thus the plaintiff showed these decrees, and under them a clear chain of title from Vallejo, the confirmee, and an adverse possession held by the defendants, and rested.

This confirmation vested the legal title to the land in M. G. Vallejo, and from him passed to the plaintiff, Steinbach.

That it did so, see the following cases decided by the Supreme Court of California, by which this principle has become the settled law of the State.

Estrada *vs.* Murphy, 19 Cal. R., 248.

Leese *vs.* Clark, 18 Cal. R, 220.
Leese *vs.* Clark, 18 Cal. R., 533.
Clark *vs.* Lockwood, 21 Cal. R., 226.

(The opinion of the Court in all these cases was given by C. J. Field.)

Emeric *vs.* Penniman, 26 Cal. R., 124.
O'Connell *vs.* Dougherty, 32 Cal. R., 478.

With many others. Down to the latest period, there has been, as we believe, no dissenting opinion, and it is considered in all our Courts a settled principle. These cases, however, lay down the principle that a Court of Equity, upon proper proceedings, will compel a transfer of the legal title to all those who hold equitable interests, and it matters not whether this confirmation is made to a party really interested in the rancho or not, or whether the petitioner for this confirmation acted in good faith, or in fraud of the rights of the true owners, Courts of Equity will control the legal estate and place the property in the possession of the true owners. The Act of 1851 invited all persons having claims to present them, and gave the Board and Courts simply the power to confirm or reject each claim presented. They had no other discretion and were not authorized to entertain any question as between contesting claimants to the land for which a confirmation was sought. This has been so often announced in this Court, that it is wholly unnecessary to cite cases to sustain this position; it has been time and again announced under the treaties of Louisiana and Florida, and that of Gaudalupe Hidalgo. If there was a confirmation, that was a release of the fee from the Government of the United States to the petitioner,

or to those who rightfully had succeeded him upon the record, by death or otherwise.

Thus having proved the fee in Vallejo, of the Agua Caliente ranch, and that the plaintiff had a full and undisputed chain of title from Vallejo, with proof of the adverse possession of parts of the rancho, of course by the defendants the plaintiffs had made out a *prima facia* case, and rested.

The defendants had set up *title in fee*, in themselves, to those parts of the ranch which they occupied, and began by offering to show title in themselves, by a chain of title direct from Peña, the grantee of the ranch. (See folio 242.)

The plaintiff objected, because at best it could only be an equity; that no such defense was set up in their answers, and if it had been, such a defense could not be made in the Circuit Court of the United States. To sustain the position of the plaintiff in this, we beg leave to refer to the following decisions made by this Court:

Bennett *vs.* Butterworth, 11 How. R., 674.
Fenn *vs.* Holme, 21 How. R., 481.
Stringer *vs.* Young, 3 Peters R., 320.
Lessieur *vs.* Price, 12 How. R., 72.
Greer *vs.* Mezes, 24 How. R., 275.
Sheirburn *vs.* Cordova, 24 How. R., 425.
Hooper *vs.* Scheirner, 23 How. R., 235.
Bagnell *vs.* Broderick, 13 Peters R., 446.

These authorities, we doubt not, are ample to show both our propositions: First, That having pleaded a legal title in themselves, they could not set up an equity. Second, That if they had set up an equity, it could not have been sustained as a de-

fense to an action of ejectment, where the legal title only can be used by plaintiff or defendants.

The defendants, however, claimed that the *proviso* in the final decree of the District Court, (see folio 191,) made it a confirmation to Peña, or his heirs, or holders under them.

We have seen before that this proviso was not affirmed by the Supreme Court, (see folio 198 and 199), where it is said the decision of the District Court "*in so far as it confirms the original* "*grant*," be and the same is hereby affirmed. This was all either Court had power to do; either to "confirm or reject." (See the Act of 1851, Sec. 8, where it is declared that the Board shall "proceed "promptly to examine the same upon such evidence, "and upon the evidence produced on behalf of the "United States, and decide upon the validity of "*the claim.*")

Therefore this proviso was wholly unauthorized and void, and we believe it is the only case before that Court where it ever was inserted.

At all events, at best, it was an attempt, as the defendants view it, to give a confirmation to persons entirely strangers to the record in the case before the Court; upon this ground it would be void, for nothing can be adjudged for or against a person not before the Court. The party before the Court may be turned out of Court upon a showing before it that some other party has the title, but this is an adjudication against him, and *not for* the party not before the Court. In a new suit between them, when both were before the Court, that judgment could not be used by either.

In support of this view of the case, we beg to refer to the following cases decided by the Supreme Court of California:

Emeric *vs.* Penniman, 26 Cal. R., 119.

In this case, it appeared that Juana Sanchez had a Mexican grant, and filed it for confirmation in the Board, made her will, leaving her property to her children and grand children, and died pending the proceedings; her children and grand children's names were inserted in the proceedings in place of hers, and it was confirmed finally to them. The Court held the executor could not sustain an action of ejectment, as the legal title had passed by the confirmation to the heirs. (The executor, by our law, can bring all kinds of actions for and about the real property of the deceased.)

O'Conner *vs.* Dougherty, 32 Cal. R., 460.

In this case, Castro had a grant, made his will, giving half to his wife and half to his children, and died. Joaquin, one of his sons, and a devisee, filed his petition in the Board, stating all the facts as to the will and devisees, and asked for a confirmation according to the facts stated, and it was confirmed to him *according to his prayer*, and our Supreme Court held that one of the other sons and devisees could not bring ejectment, he not being before the Board as a party litigant.

Berryessa *vs.* Schultz, 21 Cal. R., 513.

It was held by our Court that, where a Mexican grant had been asked for by A and B, for their own and their families' benefit, and for the benefit of their parents and brothers, and where it was granted as asked for, it was held even in *equity* that

the parents and brother had no interest in the grant which was made to A and B. The others did not ask for the grant. The opinion in this case was delivered by Field, C. J.

These authorities, it seems to us, beyond question, show that the proviso passed no interest at law, or in equity, to Peña, his heirs or grantees, and therefore, that it is invoked in vain by the defendants to show a legal title in them to this land.

It then results at best, any title they could produce from Peña direct, as they proposed, could only amount to an equity, and this we have seen from reason and authority could not be given in evidence in this action, and especially under their pleadings; and therefore, the Court erred in ruling in favor of their proposition, as stated in the first exception, at folio 242 and 243.

II.

SECOND EXCEPTION,

(*Folio* 243 *and* 244.)

To the ruling of the Court by which the defendants were permitted to give in evidence a paper signed by Vallejo, the confirmee, dated the 12th of August, 1846.

To this the plaintiff objected that it was not a defense to this action. (Folio 268 and 269.) It was in Spanish, and its translation reads as found at folio 246 and 247.

It was admitted that Lazaro Peña had, on the 4th December, 1839, executed a deed to Vallejo for this rancho, and that Hoepner, the grantee in this

deed, or paper, had gone into possession of the land, and so remained until he sold it. (Folio 248.)

The counsel for plaintiff objected to the reception of this paper, as evidence for the defense, because the same did not convey any estate from Vallejo to Hoepner, and that it was a mere license to occupy, which was terminated when Hoepner asserted title to, or attempted to convey the lands; which was overruled by the Court and excepted to by plaintiff. (Folio 249.)

The plaintiff, at a later period of the trial, offered to show, by an admission of Hoepner, (who was dead before this trial,) that this instrument was not intended or considered by the parties to it as a conveyance, but only as a license to occupy; but the Court refused to admit the evidence. (Folio 261.) This document lacks several essential parts to make it a conveyance of the fee of the land, or of any estate in the land, and it would not be considered a conveyance under any system of laws; and, under the Spanish laws, it is far short of being an effective conveyance.

In the case of Schott *vs.* Burton, 13th Barb. S. C. N. York R. 173, it was held that the deed in that case could not be supported on the allegations of the declaration: "There was no livery of seizin, and it cannot therefore have the effect of a feoffment. The deed was void as a bargain and sale, because there was no valuable consideration named, and it cannot be upheld as a covenant to stand seized to the uses contemplated by the parties, because they were strangers, and there was no consideration of blood or marriage between the

grantor and grantee, and it makes no difference that Slosson was merely the trustee for the relatives of the covenantors for whose benefit he was acting. (1 Leon. R. 195; 1 Co. 154; 2d Id. 15; Cro. C. 529; 1 Sid. R. 25; 11 John R. 337; 1 Cow. R. 622. The case of Jackson *vs.* Sebring, 16 John R. 518 to 528, is conclusive on this point and covers the whole ground."

This is no deed at common law, because it wants a seal, and therefore, by the law, now in force in California, it would be void, as a conveyance of real estate. It was, however, executed under the Mexican system. There, it is admitted no seal was required. But there are many things lacking in this instrument that were required under that system. The parties are not mentioned, and the land intended to be affected is not described, nor is there any consideration of any kind whatever expressed, and there is nothing in it which indicates an intention to create any estate in the land. It does not declare that Vallejo intends to alienate the property or ownership of the land, nor to vest the property or dominion in Hoepner. He does not grant it to him, his heirs or assigns, nor does it confer upon him any right to alienate or sell it, but simply transfers this incipient right to him for a temporary purpose that he may use it. It is simply a permission to use the land. Under the decision quoted from Barber, it could not take effect as a feoffment, because Vallejo himself had no legal estate in the land, he having bought from Peña seven months before the grant was made, nor was there any livery of seizin. It could not stand as a

bargain and sale, because it does not express any valuable consideration, and it could not operate as a covenant to stand seized to uses, because Hoepner was a stranger and there was no consideration of blood or marriage between him and the grantor; and even if these objections could be overcome, it could not operate to convey anything more than a life estate, because there are no words of inheritance; and when we look for the habendum, which in a deed of the fee, is "to hold him and his heirs," it simply declares that the object of the instrument is that the grantee may use the land.

But when we look at it as an instrument under the Spanish system, it is still less entitled to be considered a conveyance. Any one who has seen a conveyance under the Spanish law, will say at once that this bears no resemblance to such an instrument, nor does this instrument bear the signatures of both parties, which are absolutely required by the Spanish law to all legal and formal documents to make a valid conveyance, the one to grant and the other to receive; and it will be noted that while Vallejo says he has legally and formally bought, he does not say he sells it, nor are there any words used in this document to imply he has received any consideration whatever.

Febrero Novissimo, Lib. 1, Tit. vi, cap. 2d. "De los Instrumentos," divides them into authentic, public and private. The authentic are signed by the King and other high officers; public, are notarial acts; and private, are those signed by private persons without the intervention of the notary, with three assisting witnesses. As to the

public instruments, he says, sec. 2: "These are the requirements: 1st, It must be before a notary—de numero; 2d, A protocol of two parts on paper of the fourth seal, and a notarial copy taken from the register, upon sealed paper, prescribed by law for that kind of contract; 3d, It must express the day, month and year, the place where it is done, the names and titles of the contracting parties and residences; 4th, It must be signed by the parties, and if they cannot sign, then by one of the witnesses at their request; 5th, Each erasure or interlineation must be noted; 6th, the notary must sign and seal and certify that he knows the parties, or that their identity was proved by two witnesses to him known, whose names he must give, and they must also sign the protocol, and he must know at least one of these witnesses, and so certify; 7th, the notary must sign the 'escritura;' 8th, The instrument must never be torn or canceled; 9th, There must be two notaries, or one with two or three witnesses." Each of these, he states, with great particularity, as well as the formalities to be observed, and goes into a minute and full description of the kinds of sealed paper to be used.

In California these acts were done before the Alcaldes, with three assisting witnesses, and the form of the documents was precisely like that given by Febrero.

Where the mode of authenticating acts of this character was prescribed by law with so much particularity, is it not unreasonable to suppose that intelligent men, like the parties to this instrument, could have intended a sale of a rancho by this

scrap of paper, having none of the usual formalities of such an instrument.

This same author, speaking, in Lib. 2, Tit. 4, cap. 2, of the contract of sale (*venta*) says: Sec. 3, To the validity of this contract, the following circumstances are required:

"1st—A subject certain and determinate on the part of the vendor.

"2d—A price fixed on the part of the purchaser.

"3d—Aptitude in both to buy and sell.

"4th—Consent of both.

"These circumstance being so essential that if either one is wanting there is no contract." There were certain regulations of the Spani-h law that made these things necessary, and particularly the insertion of the price; because, notwithstanding that the sale was executed under all the formalities of law, each party had the right, under certain circumstances, to annul the sale, and others had the right to take the property, and it was therefore usual to release or renounce these rights.

At the close of the same chapter is given the form of a "venta de casa," which had probably been in use hundreds of years, and was as well known there to all as our form of deed is to us.

In this *escritura*, after the date, place and name, it reads "for himself, and in the name of his children, heirs, successors, and whosoever of them may have title, voice and cause in any manner, he sells and gives in real sale and perpetual alienation by right of inheritance forever and ever, to Santiago Gimenez, an inhabitant of this place, and to his," giving a description of the property by metes and

bounds, and stating from whom he derives it, whereby it belongs to the grantor in possession and property. Then follows a full and explicit covenant against incumbrances of every kind, naming them all with much particularity.

But when we consider the statement of the consideration, it is much more full, "for so many "thousand reals which he delivered to him and "passed to his real possession and effectually in this "act in such money, (explaining the kind of money,) "which, being counted, amounted to so much, of "whose delivery and receipt I give faith as having "been made in my presence, and in that of the wit-"nesses who will be named; and as paid and satis-"fied at his request, he will make in favor of the "purchaser the most firm and efficacious receipt "(*carta de pago*) which may conduce to his security; "and furthermore, he declares that the just price "and true value of the aforesaid (house) is the so "many thousand reals, and that it is worth no more, "and that he has found no one who would give so "much for it, and if it is worth or can be worth "more, of the excess, be it small or great, he makes "in favor of the purchaser and his heirs and suc-"cessors, grace and pure donacion, perfect and ir-"revocable *en sanidad con insinuacion*, and other "legal assurances, and renounces the law, (2 Title, "1 Lib. 10 Nov. Rac.) which treats of the contracts "of sale, exchange and other things in which there "is lesion in more or less than half the just price, "and the four years which it prefixes to seek its re-"cision or supplement to its just value, which he "gives as part, as in fact they were." Taking the

above as the substance of the legal, and, we may say, universal form adopted in the execution of all such papers under the civil law, how different is this form of instrument before us, in which there is no consideration expressed, no evidence that one was received, no renunciation of the laws which are intended for the protection of both parties; nor is there any word used which implies a consideration or which imports a sale; and when we come to that part of the paper where we look for the habendum, how totally different it is from the form in Febrero: "And from this day hereafter forever, he dispossesses himself, desists from, quits and divests himself and his heirs and successors from the dominion and property, possession, title, claim, demand, and whatsoever other right which belongs to him, to the aforesaid house; he cedes it, renounces it, and transfers it with the actions, real, personal, utile, and mixed, direct, and executive, to the purchaser, and to him who may represent him, in order that he may possess, enjoy, exchange, alienate, use and dispose of it at his election, as of his own thing, acquired with legitimate and just title, and he confers power irrevocable, with free, frank, and general administration, and constitutes him attorney, actor in his own cause, in order that by his own authority, or judicially, he may enter and possess himself of the aforesaid house, and of it take and apprehend the real tenancy (*seizin*) and possession, which by law belongs to him; and in order that he need not take that, he asks me that I will give him an authenticated copy of this *escritura* with which, without other act of apprehension, he shall be considered as

having taken, apprehended, and transferred it to himself, and in the meantime he constitutes himself his lessee, tenant, and precarious possessor in legal form."

And after this follows a full and particular warrantee of the title and quiet possession.

It will be seen that this form of a Spanish conveyance contains not only every essential of our own conveyances, but they are stated with much greater minuteness and particularity, and some other things are also contained in it, because certain rights existed in the vendor which do not exist under our laws. It is a principle of our law in regard to Sheriffs' sales that the certificate of sale should state the price paid; and if this is omitted, the certificate is void, and the reason is, because others have rights of redemption; and so, under the Spanish law, it was necessary to state the price, because others had the right of *tanteo*, or taking it at the same price—redemption in fact. If the grantee refuses, the contract is void, because there is but one party to it, and there can be no contract, so to speak, with *oneself*. The civil law requires that to make a contract there must be two parties giving their actual assent to it, both to be equally bound. If there is a writing, both must sign; if it is by parol, the evidence of assent must be equal as to both.

In Hoen *vs.* Simmons, 1 Cal. R., 121, the Supreme Court of the State of California, say—

"But the defendants say, that by the Mexican law a verbal contract for the sale of land was equally valid, as if it were in writing. We think

not, and so held in Harris *vs.* Brown, (*ante*, p. 78). There is no doubt about the correctness of that decision. There has never been a time, since the adoption of the *Fuero Juzgo*, under which lands could be conveyed under Spanish or Mexican law, without an instrument in writing—unless it was, perhaps, in the case of an executed contract, where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing of certain acts analogous to the *livery of seizin* at common law. Had this not been so, one main branch of the revenues of the Spanish Crown and Mexican Republic, called *Alcabala*, being a duty payable upon the transfer of land, would have been easily evaded.

"By Law 29, lib. 8, tit. 13, of the *Recopilacion de Indias*, every sale of real estate was required to be made before the *escribano* of the place where the contract was entered into, and if there was no *escribano*, before the Judge of First Instance; and these officers were required to furnish a copy and statement of the writings or contracts made before them, with the day, month, and year in which they were made, the names of the seller and purchaser, the property sold or exchanged, and the price. (*Arrillaga's Decretos*, vol. for 1838, p. 421).

"Another author says, that the conveyance of lands was required to be by a written instrument, properly authenticated, (*escrito autentico*). Without this, neither possession nor property in lands could be sustained in law; no judicial designation of boundaries, or fixing of landmarks could take place; only with the title-deeds before the eye

could these important and delicate acts be performed, whether the object were to avoid a litigation, or bring a pending suit to a termination, according to justice and truth. Such importance was attached to the formalities prescribed by law for the execution of deeds of conveyance, that if, by chance, an instrument were defective in form, as, for instance, if it lacked the signature of the judge, or *escribano*, or witnesses, or parties, or an exact statement of their acts, motives, and objects, the instrument would be vicious (*vicioso*), and consequently null (*nulo*). (*Ordenanzas de Tierras y Aguas*, p. 144, 145).

"So important was this principle of law deemed, that, in the convention between the Mexican Government and the English holders of Mexican bonds, entered into on the 15th day of September, 1837, by which the bonds were authorized to be exchanged for lands, it was thought proper to insert a stipulation, that after title was acquired and possession taken, the lands should not thenceforth be transferred, except by means of a written instrument in due form of law. (*Por medio de escritura de venta en la forma legal.*) (*Sec. 5 of such convention*, p. 53, of *Ordenanzas de Tierras y Aguas*)

"We do not doubt that a writing was as necessary for the tranfer of lands in Mexico, as it is in the United States"

In the case of Tohler *vs.* Folsom, 1 Cal., R. 210, the doctrine of this case of Hoen *vs.* Simmons was considered and reaffirmed, also in Hayes *vs.* Bona, 7 Cal. R. 159; Stafford *vs.* Lick, 10 Cal. R. 16, and Stanley *vs.* Green, 12 Cal. 166.

By law 29, book 8, title 13, of the *Recopilacion de las Indias*, every sale of real estate is required to be made before the escribano of the place where the contract is entered into, or where there is no escribano then before the Judge of First Instance.

In *Neuva Febrero Mexicano*, vol. 1, page 164, sec. 30, it is declared, "The transfer of any real estate whatsoever must be made before an *Escribano Publico* and two witnesses; or else by an *instrumento privato*, in presence of three or more witnesses, and must be signed by all the parties thereto.'

Demat's Civil Law by Shatman, Cushing's edition, vol. 1, art. 145 and 114, says, that all contracts in writing must be signed by all parties intended to be bound thereby. See also art. 260, same volume.

Certain things were not to be sold except at certain prices to be fixed at certain periods (1 White's, Rec. 188), and if any person could be found within a certain period to give more, he could have the property (1 White's, Rec. 191, 197–8). Either party who was prejudiced in the bargain might have it annulled within four years; that is, if the price was too low or too high, (Feb., Lib. 1, cap 2, sec. 6). It was absolutely necessary that a price should be stated to have been received, or else the sale was null (Febrero Novissimo, Lib. 2, Tit. 4, cap. 2, sec. 21, 32).

There is another principle that all Spanish law writers agree in, and that is this: that notwithstanding that the contract is perfect and possession delivered, the ownership, dominion or property does not pass until the price is paid. This is another

reason why it is indispensable that the price should be admitted in the *escritura de venta* to have been received or proved by evidence *aliunde*. In this case, the fact is not proved in either way.

The cases of Haven *vs.* Dale, 18 Cal. R. 366 and Mulford *vs.* Le Franc, 26 Cal. R. 88, do not overrule this decision of the Supreme Court.

In Havens *vs.* Dale the instrument was a public instrument, before the First Justice and three assisting witnesses, in due form, and contained these explicit words, "renouncing, and I henceforth renounce in his favor all the right and action that belongs to me, *and that he may possess it as such owner*, and it may *be recognized as his property in future*, and that no one may disturb him in any manner whatever. I grant this present document for his safety and security, and that it may be shown at any time," etc., etc. Neither the grantor nor any successor in interest questioned the title. The grantee had been many years in possession under it, and the objection was made by a mere trespasser.

In Mulford *vs.* Le Franc, the requisites of a writing of sale were discussed at great length. It is true that, in that instrument, the price was not expressed, but it used the word "*enaganucion*," and the instrument was a public act before the Alcalde The Court held that the word *enaganucion* was equivalent to the English word "*alienate*," and showed that the object and intent of the parties was to convey the fee of the land. That, though it was indispensable that there should be a just and fixed price, it was not necessary that that should be ex-

pressed in the writing itself, but might be proved, as it was in that case, by evidence *aliunde*. Their attention does not seem to have been called to the arguments of the *Recopilacion de las Indias*, which was intended for and applied only to the Spanish colonies in America. But even under the authorities of this case, the writing now under consideration would be insufficient to pass title. It contains no word equivalent to *enaganucion*, nor any other word importing a sale, or an intention to alienate or transfer the *dominion* or *propiedad*, nor was there any evidence offered tending to show that there was a sale or price, or that any consideration was either paid or agreed to be paid.

From these decisions of the Supreme Court of the State of California, which upon a question of local law are entitled to great respect, it appears.

1. That a contract of sale must be in writing.

2. That it must be before a Notary, Judge or Alcalde, or by a private writing in the presence of three witnesses.

3. It must clearly express the intention of the parties to alienate or transfer the dominion of the property in perpetuity.

4. It must be for a price ascertained.

5. The price must be expressed in the writing, and therein admitted to have been paid, or it must be clearly proved by evidence *aliende*.

See also 1 Mo. R. 166, Laws 9, 10, 20, Title 5, Partida 5.

It will be seen that the document in question lacks all the essential requisites of an *escritura de venta*, and there is an absence of all the usual and

customary formalities usually accompanying the titulo of a rancho. It is, also, not written upon stamped paper, where the use of stamped paper was not only customary, but absolutely required by law, and there is nothing said in the paper of inability to procure stamped paper.

Is it at all probably that the Commandant General of California, intending to transfer the title of an entire rancho to Hoepner, a scholar familiar with the requirements of the civil law, would have made such a document as this, expressing no price, signed by but one party, lacking the legal number of witnesses, containing none of the renunciations of the law, usual or customary, not executed before the Alcalde, not on stamped paper—he being a high officer of the government, and it is to be presumed abundantly supplied with that articles—using none of the terms which imply a sale or intention to transfer the dominion, and in no respect resembling the usual and formal deed; yet declaring that he himself holds it by purchase by formal title.

It is impossible, construing this instrument in the light of surrounding circumstances, to believe that it was intended for anything but a license to occupy temporarily.

The defendants relied upon this as their only evidence of title.

In all particulars the defense failed, and we respectfully submit that the document was inadmissible, did not tend to show any title in the defendants, nor to make out any defence.

IV.

But again, if this was a paper having any legal efficacy, and was intended to operate and could operate on the interests of Vallejo, then it will be seen that at best, it conveyed a mere equity, and therefore, in any light, by any rule of law, cannot estop Vallejo, or those claiming under him; see Jackson *vs.* Bradford, 4 Wend. R., 620, where it was held that such a paper could not estop the grantor from suing on an after acquired title, because there was no words of warranty in it, and the same principle is sustained by the case before cited.

But if it could have acted as an estoppel, the defendants were bound to, but did not plead it. (See Dugal *vs.* Frier, 3 Missouri R., 29; Rector *vs.* Waugh, 17 Mo. R., 26.) These cases hold that there was no estoppel upon the party making the conveyance, though it was insisted it ought to estop him because he acquired his rights, by which he made the second deed, through a paper in existence when he made the first deed; but it was held no estoppel, because that was a quit claim of his right then held, the Court holding that the right to sell had not then accrued, but had afterwards, when he made the second deed. This is exactly the case at bar. Vallejo had no title when he sold to Hoepner, in this ranch, although things had then happened out of which sprung this future right acquired by the final decree of confirmation to him of this rancho, after which he sold to this plaintiff.

It is a principle of law, that estoppels are odious

and must be pleaded, or the estoppel cannot be insisted on. In pleading estoppel by deed, it is admitted that the deed passes no title, but that the party having executed it, is estopped, to say it passed no title. But to estop him, the deed must use such words as would show the grantor intended to grant the fee. But, if he only uses, as in this paper, such words as imply an intention to convey his then right only, and does not declare an intent to convey the fee or absolute dominion, or any other particular estate, there is nothing to estop him. The grantee has no right to complain, if he takes such a deed.

If the grantor uses words to show he passed the fee, he shall not be allowed to say against his deed, that he had no fee. But this is only by statute. If, however, there is anything in this paper which purports to convey the fee, in this 12th of August, 1846, paper, by which Vallejo or his alienees could have been estopped, the defendants did not plead the estoppel, and therefore their right to do so, or to rely upon it, is gone. This paper does not so purport. It will be seen, by the examination of this record, that on the 12th of August, 1846, Vallejo had not even a shadow of title; that paper we have fully shown, cannot be construed at the utmost limit of construction against him, to have attempted to pass any other right—or quit claim—or any other than the right he held—if he held any.

The record shows that on the 14th October, 1839, Peña made a petition for the grant, and got an endorsement on it by the military commandant at the post, authorizing him to possess it till he

should have time to apply to the Governor, and until he acted upon it. This certainly passed no title or right. The military were not entrusted with the disposition of lands under Mexico. This officer is not named in Mexican regulations for the disposition of lands, as one that may be applied to for a grant. He, however, did not pretend to grant, but only gave leave to occupy till he could apply to the Governor.

On the 4th December, 1839, it is admitted Peña deeded it to Vallejo. In June, 1840, Peña petitioned the Governor for a grant, and, in July, the grant was made by the Governor. Therefore, Vallejo, in August, 1846, had no title, and could pass none. It is a settled principle, at least of the civil law, if the party making the conveyance of land had nothing in it, nothing passed by the deed; and, for this principle, see

Vattiere *vs.* Hinde, 7 Peters R., 271.
Boona *vs.* Chiles, 10 Peters R., 210.
Burley *vs.* Haley, 4 La. R., 120.
Hopkins *vs.* Van Wickle, 2 An. R., 144.

These cases are ample to sustain this principle, and are exactly, as we respectfully submit, in point.

Hence, the efforts of the defendants to rely on this paper as conveying them the fee must unquestionably fail. If Vallejo was in contest with Peña or his grantees, he might, if Peña's deed to him attempted to pass the fee, rely upon the estoppel, but that does not arise here between these parties, nor can it be made to pass a subsequently acquired title. As we have seen, it could not operate as a feoffment, because the grantor himself had no fee. That it

could not operate as a bargain and sale, for want of a valuable consideration, and that it could not act or operate as a covenant to stand seized to uses, because there is no connection of blood or marriage. It would be at most a quit claim, or a deed of all the right, title and interest of the grantor, and that cannot convey an after acquired title, as was decided in Gee *vs.* Moore, 14 Cal., 472; Kimball *vs.* Temple, *et als.*, 25 Cal., 452; Blanchard *vs.* Brooks, 12 Pick., 47; Comstock *vs.* Smith, 13 Pick., 116; Miller *vs.* Ewing, 6 Cal., 34; Dutchess of Kingston's case; 2 Smith's leading cases; Jackson *vs.* Bradford, 4 Wend., 620; McCracken *vs.* Wright, 14 Johns., 194; Jackson *vs.* Weisslow, 9 Cowan, 13.

V.

The 3d and 4th assignments of error are the same in principle. In both cases, the defendants were allowed to put in evidence deeds which were no deeds of any particular piece of land. One of them (Whitman's) called for hills as a boundary, which are several miles in breadth. Another, instead of calling for any particular points, is indefinite, and for no particular portion; and another calls for the farm of Rufus, which was not shown to exist, and did not in fact exist. No evidence was given of these calls, nor any attempt to prove that any such calls ever existed. In the Watriss tract, there was a still greater uncertainty, for it gave no call at all. It was simply of one mile square of land in the rancho.

The defendants were allowed to prove that, at

the time of the date of the deeds respectively, the grantees *took possession* of the pieces of land severally, of which they severally claimed to be in possession. It was not contended that the grantor put them in possession of those tracts of land, or that he had ever acquiesced in it, or had done any act showing any ratification.

Conveyances of land must be *in writing;* a conveyance of land which is so uncertain in its terms, as to put it beyond the power of construction to determine what was intended to be granted is void for uncertainty. It would be impossible for any Court to tell what was intended to be granted by the deed of one mile square to Jacob Dopkin, now claimed by Mrs. Watriss. We cannot say that the grantor had in view a particular tract of land, because there is no such intimation given in the deed. There is no call in the deed, not a single corner, boundary line, course or distance, nor does it tell to what part of the rancho this mile square is to be located, whether in the Northern, Southern, Eastern or Western. "One mile square of land, "English measure, containing six hundred and forty "acres, situate, lying and being in the District of "Sonoma, and being part and parcel of that certain "tract of land called Aqua Caliente," etc., would certainly imply an intention of conveying some *particular tract* of land. It is not quantity, a square mile, but it is *a piece*, a mile square, and this particular piece is situated in the District of Sonoma, and is a part of that rancho, showing, we think, an evident intention to convey a *certain piece* or parcel, and not an undivided interest in the

rancho, equivalent to that quantity. It is a very common thing in California to convey an undivided interest in ranchos by quantity, that is to say, a mile or a league, or so many acres, and this is understood to mean an undivided interest in the rancho equivalent to that quantity. A league in the rancho of four leagues is one-fourth, etc., but the intention is evident in these deeds to convey a divided quantity. It is evident in this deed that the parties did *not* intend an undivided interest, but a certain parcel thereof, and this is the defendants' own construction of the contract. Parol evidence is always admissible to show where the calls of a deed are situate; that is not to make a deed by parol, but simply to interpret its language. When you find where the calls are, the deed describes and conveys that particular piece of land. But you cannot supply by parol the description of the land intended to be granted. Here, the object of the testimony was, by parol testimony, to supply the absence of a description. Either under the civil or common law, as we have seen, the conveyance must clearly describe the land intended to be conveyed. It is impossible that ejectment would lie upon such a deed. Could the grantee maintain his claim to any particular tract by such a deed?

But, it will be said that the acts of the parties locate the land. Not unless the act of the grantee can have that effect, for it was not pretended that Hoepner placed the defendant in possession, nor that he consented to the location, nor that he ever knew of it, or knew that the defendant was in possession; nor that he lived in the neighborhood, or

did any act tending to show any acquiescence. We offered to show that Hoepner abandoned all claim to the rancho.

M. G. Vallejo, on the 8th day of March, 1849, for the consideration of eight thou-and dollars, by deed duly executed, delivered and recorded, sold and conveyed to John B. Frisbie the whole rancho (87,239), showing that Vallejo totally disowned the acts of Hoepner, and did not recognize any title in those persons to whom he had made conveyances. These persons had no deeds upon record, and there was nothing to call for objections or remonstrances from Vallejo. If, therefore, such a deed could be made good by acquiescence, there is no acquiescence, or acts shown, from which acquiescence can be inferred. If you can supply the total want of a description in a deed by parol (which we deny), there is no such evidence.

VI.

FIFTH ASSIGNMENT OF ERROR.

"There is also error in this, that the said Court refused to allow the said plaintiff to give evidence in rebuttal to that given, as aforesaid, by the several defendants, to show that even if these deeds to the defendants from Hoepner did create an equity in them, Hoepner wholly failed to perform the conditions to the said Vallejo, upon which the semblance of an equity rested, and that, therefore, the equity ceases." (Fol. 271, 272).

"After the defendants had closed their testimony, the plaintiff's counsel offered to prove, by state-

ments made by Andreas Hoeppener, in 1848, that Hoeppener and Vallejo agreed that Hoeppener should teach Vallejo's family music, for which Vallejo was to convey him the rancho; in the meanwhile, Hoepner was to occupy it; that neither Hoepner nor Vallejo intended or considered the said instrument as a conveyance, or more than a license to occupy; that Hoepner did not perform his agreement, but after part performance abandoned it, and admitted that he had no claim to the land, all of which took place in the years 1847, 1848."

"The Court refused to receive any testimony as to statements of Hoepner subsequently to the date of his conveyance to others, and excluded the testimony, to which ruling of the Court the counsel of the plaintiff then and there duly excepted, and his exception was duly noted." (Fol. 260, 262).

The title of the defendants, Charles V. Stewart and Jacob B. Warfield, is deraigned in the finding as follows: Andrew Hoepner died intestate prior to 1857, leaving his widow Anna his sole heir; she conveyed to James B. Travers, who conveyed an undivided part, which finally vests in Stewart, and he conveys part of the tract to Warfield, (Tr. fols. 90 to 106), and the finding expressly declares that whatever title the said Stewart and Warfield have to the tracts they hold respectively is derived through this chain of title. (Tr. fols. 101, 105).

It is not apparent, therefore, why the evidence is excluded. At the time that Hoepner made this declaration, he was the holder of all the title that he ever had in this tract of land of three hundred and eighty acres. (1 Greenlf. Ev., Sec. 189.)

We think it was error in the Court below to hold "that the open and notorious possession of the defendants, George W. Whitman, Martha C. Watriss, Charles V. Stewart, and Jacob B. Warfield, was sufficient notice to the plaintiff, when he purchased the tract Aqua Caliente of Mariano, G. Vallejo, of their title and interest in the parcels respectively occupied by them, to prevent the plaintiff from claiming said several tracts as a bona fide purchase without notice." (Tr., fol. 107.)

Neither the so called conveyance from Vallejo to Hoepner, nor the deeds from Hoepner under which Whitman and Watriss claimed, were recorded, so as to impart constructive notice, and these deeds were therefore void as against the plaintiff, who was a bona fide purchaser for a valuable consideration of the legal title unless he had *actual notice*. For the words of the statute are, "Every such conveyance of real estate within this State hereafter made, which shall not be recorded, as provided in this Act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded." (Stat. Sec. 2d, Wood's Dig., Art. 263.)

It will be perceived that the statute says nothing about a notice, but makes all deeds not recorded void as to subsequent conveyances, taken in good faith, for a valuable consideration, and duly recorded.

Woodworth *vs.* Guzman, 1 Cal., 206.
Call *vs.* Hastings, 3 Cal., 183.
Mesick *vs.* Sunderland, 6 Cal., 315.
Stafford *vs.* Lick, 7 Cal., 489.

Dennis *vs.* Burritt, 6 Cal., 672.
Chamberlain *vs.* Bell, 7 Cal., 294.
Watson *vs.* Robay, 9 Cal., 54.
Brannan *vs.* Merrick, 10 Cal., 108.

"The Registration Act abolished all *constructive notice* of unrecorded conveyances, but it did not do away with *notice in fact*. Possession therefore *is not constructive notice* of title, but it may be *admitted in evidence* along with *other facts* to establish fraud or actual notice."

Mesick *vs.* Sunderland, 6 Cal., 315.
Stafford *vs.* Lick, 7 Cal., 489.

"The intention of the Legislative Act of the State was to protect the purchaser of the legal title against equities or mere existing agreements, and to abolish the *presumption* of notice arising from possession."

Mesick *vs.* Sunderland, 6 Cal., 315.

"As to the implied notice arising from the possession of, or partly under an unregistered deed, it is a question of *bad faith*, and it should be left to the jury whether the subsequent purchasers *had actual notice*, or such means of notice as to make his negligence a species of fraud."

Bird *vs.* Dennison, 7 Cal., 305.

"The grounds on which Registry Acts are based, are, that the party who fails to record his deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible as assisting in the fraud. (Ib.)

"The Forty-first Section of the Registration Act requires conveyances made before the passage of the Act to be recorded, and the penalty of failing to do

so, is the same as with conveyances made after the Act is passed."

Stafford *vs.* Lick, 7 Cal., 486.

"This section of the Act is neither in violation of the Constitution of the United States, nor of this State, as it does not impair the obligations of contracts, but merely establishes what shall be constructive notice to third parties; nor does it divest vested rights, but only introduces a rule for the subsequent protection of the rights of parties." (Ib. 487.)

"So the object of the law requiring the record of entry on lands under School land warrants, was to give notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void as to a subsequent locator with *actual notice*."

Watson *vs.* Roben, 9 Cal., 54.

"The provision is like that of the Act concerning conveyances, which requires the record of certain instruments.

"A party cannot complain that he was injured by a failure to record in the proper office, *when he knew the fact without record*." (Ib.)

"The failure to record only protects *bona fide* purchasers for a valuable consideration."

Hunter *vs.* Watson, 12 Cal., 3.

"It was intended to protect subsequent purchasers in good faith, and for a valuable consideration."

Pixley *vs.* Huggins, 15 Cal., 132.

"A subsequent purchaser with *actual notice* cannot object to the defects in the registration."

De Leon *vs.* Higuera, 15 Cal., 495.

It will be seen from these authorities, that though possession is *evidence* of notice, it is not notice under the Act of this State. The Act makes the unrecorded deed void, as against purchasers in *good faith*. It says nothing about *notice*, and the question is simply one of good faith. A question of fact. If a party has *notice*, he cannot be a purchaser in *good faith*, but the question is one of fact. We do not contend that possession is not evidence, but it must be connected with other *facts* to prove that the subsequent purchaser had actual notice; but we contend that the mere fact that the defendants, the respondents, were on the rancho with deeds not recorded, and having no definite boundaries, was no evidence of actual notice to the subsequent purchaser, in the teeth of his own oath that he had no notice. Implied or constructive notice of a prior deed must be not merely a probable but a *necessary* inference from the facts proved.

McMechan *vs.* Griffing, 3 Pick., 149.
Pomroy *vs* Stevens, 11 Metcalf, 244.
Spofford *vs.* Weston, 29 Maine, 144.
1 Story's Eq., Sec. 398.

In Havens *vs.* Dale, 18 Cal., 367, the Supreme Court says:

"The main question arises on instruction, and re-
"fusal of instruction, touching the character of pos-
"session, which protects the vendor holding an un-
"recorded deed as against a subsequent bona fide
"purchaser without further notice than is implied
"from such possession. Brown, through whom
"plaintiff claims, sold, previously to his mortgage

"to plaintiff's predecessors, a part of this land, five "hundred varas, to one Vasquez, but the deed was "not recorded. Vasquez went into actual posses- "sion of part, built a small house, and occupied and "enclosed a portion. The plaintiffs contend that he, "and those representing him, exercised no ostensible "control or dominion over any part except over the "small part so occupied and enclosed, and they con- "tend that this possession is not sufficient evidence "of notice of title to the whole tract. Hunter *vs.* "Watson, (12 Cal., 363) decides that the open, no- "torious possession of real estate is evidence of "notice. Smith *vs.* Dale (13 Cal., 510) holds that "the possession of a tenant is not notice of his "landlord's title. But the reasoning in both of these "cases strongly tends to ignore the pretensions of "the respondent, for the fact of the possession is "made the predicator of the notice, and it is not "perceived how, seeing a man on one acre of land "raises the presumption that he has title to an un- "limited and indefinite tract in the same neighbor- "hood. It would produce great confusion, and im- "pose great restrictions on sales of land, as well as "induce uncertainty of titles, if a purchaser could "not safely hold part of an eleven league grant "without the risk of being ousted by one of a mul- "titude of occupants of huts or shanties, on acre or "half acre lots, claiming various tracts by force of "secret contracts, leases and conditional or even "parol sales. The facility of antedating such in- "struments, or fabricating proof of some parol con- "tract, would lead to frauds and forgeries innumer- "able. Taking possession to be notice, it must be

"held, under such circumstances, as that those cir-
"cumstances give notice of the land so held, and it
"is therefore impossible to say that the mere en-
"closure of one acre gives any notice of a claim to
"a larger quantity; for how can it be ascertained
"what are the boundaries or extent of the outside
"claim, where it begins, or where it terminates?
"Does it extend to the whole grant, or if not, to
"what part? And is it the duty of every purchaser
"to go to every settler or tenant on land covered by
"a grant, to see whether he has some secret deed, or
"claims to hold by an unrecorded contract? We
"think it much more reasonable and just that the
"party holding the secret title should lose by his
"neglect of a simple duty like the recording of it,
"than that third persons should suffer by his negli-
"gence, and all persons be thrown into doubt and
"uncertainty. It was under pressure of authority
"too strong to be resisted; we went even to this ex-
"tent of the doctrine declared in Hunter *vs.* Watson,
"in favor of the holder of the unrecorded deed.
"We have no idea of still farther extending the
"doctrine. It is better that the law should be cer-
"tain; even when certainty sometimes tends to in-
"justice, than that every title should be exposed to
"contest and doubt, by establishing a principle for
"the advantage of the imprudent and the negli-
"gent."

The Circuit Judge does not find, as a fact, that Emil Steinbach, the plaintiff, had any notice of the deeds under which these defendants claim, or that they had any title. He finds "that the said plain-tiff, Emil Steinbach, paid to the said Mariano G.

Vallejo, for the said deeds of the said tract, a valuable consideration at the time, and that he made his purchase of said tract, and recorded said deeds, *without knowledge or notice, actual or constructive, of any other conveyance of said premises*, or of any interests therein, except as given by the actual, open and notorious possession and occupation of the defendants, Geo. W. Whitman, Martha C. Watriss, J. B. Warfield and Charles Stewart, as hereinafter mentioned. (Tr., folios 90, 91.) He does not find, as a fact, that he had any notice at all, or that he knew, or had any information of the fact of such possession, But, as a *conclusion of law*, he decides that the open and notorious possession of the defendants is sufficient notice "to prevent the plaintiff from claiming said several tracts, as a bona fide purchaser without notice." (Tr., folio 108.)

We do not so understand the statute. We understand the statute and the whole current of the decision, that the failure of a purchaser to record his deed is a *fraud* upon the subsequent purchaser. That if the subsequent purchaser buys in good faith, and for a valuable consideration, and places his deed upon record, his title is protected by the statute against any unrecorded deed. That, to show that the subsequent purchaser is not a purchaser in *good faith*, it is incumbent upon the holder of the prior unrecorded deed, to prove to the satisfaction of the judge or jury, that he had *actual notice*, which, of course, proves that he is not a purchaser in good faith; that, for that purpose possession is admissable *in evidence;* but the fact of *notice* does not flow from

it *as a conclusion of law*, and whether the subsequent purchaser had notice in fact or not, it is a matter of *fact* to be proved to the jury, and depends on the circumstances of the case; that in a country where every rancho is covered by squatters, a purchaser has a right to depend upon the recorded title and is not bound at his peril to go to every person upon the rancho and inquire of his title; nor is the vendor to be ousted of his rights by the mere claim of a squatter. If vendor and vendee reside in the same town, and the subject of sale is a town lot, and that in the possession of one holding under an unrecorded deed, a jury would be warranted in inferring that the purchaser had notice; but if the subject of the sale was a distant rancho, a jury would not be warranted in so inferring, unless proof was adduced that the purchaser knew or was *informed of the fact of such possession*.

Possession conveys notice, but in order to make possession carry notice, *the fact of possession* must be brought to the knowledge of the purchaser at the time of his purchase. But, in any event, the *possession* is merely *evidence* from which notice may be *inferred*, not *presumed*, and *notice in fact*, does not flow from it as a *conclusion of law*.

None of these defendants, therefore, stood in a position to exclude the testimony offered as to the declaration of their grantors.

In regard to such declarations the Supreme Court of California, in Stanly *vs.* Green (12 Cal. 148), says:

"That such declarations of the grantor are admissable, not only as against himself, but against parties claiming under him, is a familiar principle.

The subsequent claimants are considered as standing in his place, and as having taken the title *cum onere*, subject to the same charges and restrictions which attached to it in his hands. It matters not whether the declarations relates to the limits of the parties own premises or to the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises, *or lessen his own title*, they are admissable. (Cowen and Hill's notes to Phillips, Part II, note 19. and cases there cited; 1 Greenlf. E., sec. 189)."

There is another view of this question, which we think is not only applicable to, but absolutely controls this case. These defendants are all second or third purchasers under Hoepner, and as we have clearly shown, their rights, to make the best of them are no more than a very slight equity; unquestionably they do not hold or even claim a legal title, and the established doctrine is, that he who buys an equity is held to know all its defects, and that the registry acts are only to protect the purchasers of the legal estate who do so in good faith This rule is laid down, fully and clearly, by this Court, in the following cases:

Vattiere *vs.* Hind, 7 Peter, 252.
Hallett *vs.* Collins, 10 How, R. 174.
Boone *vs.* Chiles, 10 Peters R. 210.
Dupont *vs.* Wertheman, 10 Cal. R. 368.

It is true these persons were defendants in this action, but under their pleadings, as they undertook to make out a legal title in themselves, they, as to that, became plaintiffs in that part of the

issues joined, and, therefore, the doctrine of these cases applies to them. As they, at best, showed only an equity purchased from Hoepner, they are held to stand (if we may use such an expression) in Hoepner's shoes, whilst Steinbach purchased the legal title from Vallejo, without any notice of their claim, as the Court found; he, therefore, stood in Vallejo's shoes. The contestants, the defendants, are held to all the defects of Hoepner's title, and we offered to show what these were—the Court refused, and we excepted. The record will show what we proposed to, and were refused leave to prove.

We respectfully submit this case upon the authorities and reasons given. The plaintiffs have, and the defendants have not, shown a title. We therefore ask with confidence a reversal of the judgment of the Circuit Court.

JOHN WILSON,

Attorney for Plaintiffs in Error.

No. .....

IN THE

SUPREME COUR

OF THE

UNITED STATES.

EMIL STEINBACH,

Plaintiff in Erro

vs.

CHARLES V. STUART, et als.,

Defendants in Er

Argument for Defendants in Err

E. D. WHEELER,
Of Counsel for Defendants in E

C. T. BOTTS,
Of Counsel for Defendants Whitman and Wa

In the Supreme Court

OF THE

United States.

EMIL STEINBACH,
Plaintiff in Error,
vs.
CHARLES V. STUART, ET ALS.,
Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR.

This was an action of ejectment brought in the Circuit Court of the United States for the Northern District of California, by Emil Steinbach, plaintiff in error, against the defendants in error, and twenty-nine others, to recover the possession of a tract of land situate in the County of Sonoma, in said State, and known as the "Agua Caliente" rancho.

The complaint was filed April 30th, 1864; and subsequently the defendants in error, to wit: Charles V. Stuart, George W. Whitman, Martha C. Watriss and Jacob B. Warfield, filed their

separate answers, denying each and every allegation of the complaint, and alleging ownership and possession in each, of a small portion of the tract mentioned in the complaint.

The cause was tried before the Court, without a jury, on the 1st of September, 1865, resulting in a judgment against all the defendants except the defendants in error, and in their favor tor the parcels by them claimed respectively. To reverse this judgment the present writ of error is brought.

Preliminary to the argument of the questions presented by the plaintiff in error, we move to dismiss the writ on the ground that the property in controversy is not of the value of two thousand dollars; and hence this Court has no jurisdiction to entertain the cause.

The statute governing these proceedings gives this tribunal jurisdiction in cases "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs."

The matter in dispute in this cause is four small parcels of the land contained within the area of an entire Mexican grant, measuring two and a half leagues in length by one-fourth of a league in width. The suit was brought for the entire grant, against the four defendants in error and twenty-nine others. The Court gave judgment in favor of the plaintiff in error and against all the defendants (except the four defendants in error) for "the entire premises described in the

complaint," except the four parcels claimed and occupied by the four defendants in error. (Folio 128.)

With this judgment, so far as the other defendants are concerned, the plaintiff in error is entirely satisfied; his exception is confined to the judgment in favor of the defendants in error for the four small parcels described in their respective answers, and designated in the findings and judgment of the Court. It therefore is clear that the matter now in dispute is these four parcels and no more. There is nothing in the record, nor was there any evidence at the trial, tending to establish any value in these parcels, or in any of them. (*Grant* v. *McKee*, 1 Peters, 248.)

But if the case as it now stands involved the entire grant, the plaintiff's position would not be improved. The value of the tract is not mentioned in the complaint, nor is there a word of proof contained in the record on the subject. It may be urged by counsel for plaintiff that inasmuch as he asks for damages in the complaint, exceeding two thousand dollars, the jurisdiction is saved. This view, we submit, cannot be maintained. This is an action for the recovery of land, and the claim for damages is merely incidental. In the course of time the action of ejectment has grown from a personal to a real action. It has superseded the ancient writ of right, both in England and the United States, and is now the form of action almost universally

employed for the trial of questions of title to real estate. The question of title, then, is the principal; the claim for damages, the mere incident.

On the subject of jurisdiction, Chancellor Kent says:

"The general principle is, that if a Court has no jurisdiction of the principal question, it has none of its consequences and incidents." (9 John., 241.)

Again, in *Bank of Alexandria* v. *Hooff et al.* (7 Peters, 168), Chief Justice Marshall, delivering the opinion of the Court, says:

"This is a motion to dismiss an appeal from a decree of the Court of the United States for this District, sitting in the County of Alexandria, because the matter in controversy does not amount to one thousand dollars.

"The bill was filed for the purpose of obtaining a decree for the sale of a lot, on which a deed of trust had been given to secure the payment of a sum of money amounting with interest to less than one thousand dollars. The bill was dismissed, and from this decree an appeal was taken. The appellant alleges in support of the jurisdiction of the Court, that the real question is, whether the debtor be entitled to the lot, and as that is worth more than one thousand dollars, this Court may take jurisdiction, though the sum claimed in the bill is less. The Court is of a different opinion. The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit. The appeal is dismissed."

But if the claim for damages should not be

considered as merely incidental; even then there are no facts stated conferring jurisdiction. The ouster is laid on the 5th of February, 1864, and the suit was brought April 30th, of the same year. (Fols. 20 and 24.)

It is alleged in the declaration that the monthly value of the premises were one thousand dollars. (Fol. 21.) That is, that the entire grant, two and a half leagues by one-fourth of a league, was worth that sum per month. But the entire grant not being in controversy, it follows that its incidents are not in question; and as only the four parcels claimed by the four defendants in error are now in question, and as there is no allegation or proof in the record as to the value of these parcels, or of the value of their use, the Court is left entirely in the dark as to the amount involved. The value must affirmatively appear, either by the pleadings or by affidavits. Besides, at the trial the plaintiff entirely abandoned his claim for damages. Not a syllable of evidence was offered on the subject; and it can hardly be affirmed that a thing is in dispute concerning which the plaintiff makes no claim nor offers any proof.

It may be replied that the answers admit the value. The answers simply aver that the defendants have placed certain valuable improvements on the land.

These averments are mere surplusage. The

learned counsel for plaintiff have shown that an equitable defense can not be set up in an action at law in the Federal Courts. That being the case, the averment of the making of improvements is an immaterial and unnecessary averment, and is not well pleaded. In such cases the unnecessary matter will be rejected by the Court, and the pleadings will stand as if it were stricken out or had never been inserted. (Gould's Pleadings, Chap. 3. Sec. 170.) Matter ill pleaded is not taken as confessed even on demurrer.

In any view of the case, therefore, we respectfully submit there is not sufficient appearing on the face of the record to give this Court jurisdiction; and hence the appeal should be dismissed.

But if the Court should be against us upon the point of jurisdiction, we are fully prepared to argue the case upon its merits, which we now proceed to do.

The first point made by the plaintiff in error is, that by the decree of confirmation in the case of *Vallejo* v. *The United States*, the legal title to the premises in controversy vested in the plaintiff's grantor; that the plaintiff could maintain this action upon the legal title only, is too well established to need the citation of authorities. Otherwise, we would refer to the case of *Fenn* v. *Holme* (21 Howard, 483); *Hooper* v. *Sceimer* (23

Howard, 249); *Sherburn* v. *Cordova* (24 Howard, 425); and *Swayne* v. *Burke* (12 Peters, 23). Even in the State Courts of California, where to avoid circuity of action a defendant in ejectment may plead his equitable title, it is held that ejectment can be maintained only upon the *legal* title. If we succeed, then, in showing that the plaintiff had not the legal title to the premises at the institution of this suit, the judgment must be affirmed.

The decree of confirmation, says the plaintiff's counsel, vested the legal title in Vallejo, the plaintiff's grantor; and for this proposition he cites several California authorities. Upon this point we take issue with the opposing counsel. We deny that such is the effect of any so-called decree of confirmation, and we deny that the cases cited support the assertion. We will first review these cases:

The first is *Leese* v. *Clark* (18 Cal., 535). This was ejectment for certain lots situate in San Francisco. Leese, the plaintiff, claimed under a Mexican grant made by the Governor of California, in May, 1839, followed by a confirmation by the Board of United States Land Commissioners, a survey by the United States Surveyor General, and, finally, by a patent issued in due form. These proceedings, of course, vested the *legal* title in the plaintiff. To meet the case thus presented, the defendant produced sundry grants of the same premises, made in 1847, by persons

then acting as Alcaldes or Chief Magistrates of the Pueblo of Yerba Buena, or town of San Francisco. The Court held that the title of the plaintiff, evidenced by his patent, was the true title; and remarked: "If the adverse claims were mere equitable interests, as in many instances is the case, the confirmation, *followed by a patent*, would entirely extinguish them." (P. 569.)

We see nothing in this case tending in the slightest degree to sustain the position assumed by the counsel for plaintiff. Indeed, so far as the case goes, it establishes the contrary doctrine.

The next case is *Estrada* v. *Murphy* (19 Cal., 248). Estrada brought ejectment on an imperfect Mexican grant, which had never been presented to the Board for confirmation. Murphy, the defendant, met the claim by showing a confirmation to himself, together with an *appr ved survey*. The Court held that, under the Act of Congress, the land, as to Estrada, was to be considered public land, he having failed to present his claim for confirmation. As a plaintiff in ejectment must recover on the strength of his own title, it was not necessary to discuss Murphy's title—the plaintiff having entirely failed to show a legal title in himself. Though Mr. Chief Justice Field remarks (p. 272) that the confirmation established the legal title in the confirmee, the majority of the Court, Justices Baldwin and Cope, clearly hold that in addition to the confirmation a survey is also requisite. They say:

"The defendant, Murphy, claims by a confirmation and *approved survey* of land, under proceedings before the Land Commission taken by him. * * * The Act of Government in confirming the claim of Murphy, the adverse claimant, *followed by the approved survey*, invested him with the legal title to the premises, and the plaintiffs cannot, in an action at law, nullify the confirmation or dispossess him of the land held under it *and the approved survey*." (P. 273–4.)

Again: "We have no hesitation in holding that the holder or assignee of a grant issued by a California Governor * * cannot recover in an ordinary action of ejectment against the confirmee of the Federal Government, *having an approved survey*" (P. 275.)

It is apparent that the majority of the Court attached great importance to the fact that Murphy not only had a confirmation, but also a survey; for the words "approved survey" are repeated no less than four times in about one page of the opinion, and were clearly employed *ex industria*.

The next case cited is *Clark* v. *Lockwood* (21 Cal.. 220). This was an action of ejectment. The plaintiff showed a grant and confirmation. The decrees of the Commission and of the District Court both gave *specifically the boundaries of the tract* (p. 222). And Mr. Justice Field remarks, speaking of these specifically defined grants, that "the official survey and measure-

ment must have resulted in the simple identification of those boundaries." (P. 223.)

The defendant in the case appears to have had no equities, and does not in any manner connect himself with the grant. And whilst it is true the Chief Justice remarks that the legal title vested by the confirmation alone, he cites no authority in support of that position, except the case of *Estrada* v. *Murphy*, above mentioned.

The next case is *Emeric* v. *Penniman* (26 Cal., 119).

Emeric, the plaintiff, sued a stranger to the title in ejectment, as administrator. The heirs of the intestate, however, were the confirmees of the grant in question, with a *survey duly approved*. (P. 123.)

Under this state of the case, the Court held that the administrator had not the title. The Court say: "Until a confirmation *and segregation* of the quantity designated by the grant, the *legal* title to the land remained in the Government." (P. 123.)

Again: The legal title became vested in them (the devisees) "by a final confirmation of their claim *and the segregation* of the quantity of land granted." (P. 124.)

The next and last case cited on this point is *O'Connel* v. *Dougherty* (32 Cal., 458).

This was ejectment by the grantee of one of the heirs, who was also administrator of the original Mexican grantee. The petition to the

Board of Land Commissioners was presented by the administrator of the original grantee, and the grant confirmed to him. In delivering the opinion of the Court, Sawyer, J., says:

"The confirmation was to him, and the legal title is in him, *or will be when the patent issues;* and for all the purposes of this action, under the Act of June 14, 1860, he stands in the same position as he would if the patent had issued." (P. 426.)

Though it is not declared in terms in the opinion that there had been an approved survey in this case, yet it is evident there had been.

The survey is assumed to have been made by the counsel for the prevailing party, in his remarks found on page 159. He there says:

"In all the decrees confirming the title, as also the decrees *approving the survey*, Joaquin I. Castro alone is recognized as the petitioner and confirmee."

Again, as above shown, the Court hold that the confirmee, for the purposes of this action, is in the same position he would occupy if a patent had issued. But he is in that position by virtue of the Act of June 14, 1860. That Act, after providing in detail for final surveys of confirmed Mexican grants, contains this provision: "And the said plat and survey so finally determined by publication, order or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States." (Brightly's Dig. Supplement, p. 1134, sec. 10.)

The fact that counsel speaks of the decrees "approving the final survey," and that the Court assigns to the plaintiff the position of a patentee, under the Act of June 14, 1860, renders it clear that in the case then under consideration there had been both a confirmation and an approved survey.

The California cases relied upon by plaintiff's counsel amount to this: The first case (*Leese* v. *Clark*, 18 Cal., 535,) does not contain even an intimation favorable to plaintiff's theory, but virtually holds the contrary. In the second case (*Estrada* v. *Murphy*, 19 Cal., 248,) there had been a confirmation and approved survey; and the majority of the Court rest their decision on the fact that there was both a confirmation and a survey.

The third case (*Clark* v. *Lockwood*, 21 Cal., 220,) was where there had been simply a confirmation; but the decree gave *specifically* the boundaries, and the Chief Justice remarked that the legal title was in the confirmee.

In the fourth case (*Emeric* v. *Penniman*, 26 Cal., 119,) there had been a confirmation and a final survey, duly approved; and the Court expressly treated the survey as an important element in the title.

The fifth and last case (*O'Connell* v. *Dougherty*, 32 Cal., 558,) was also a case where final survey had been made; and the Court gives to the confirmee the legal status of a patentee, not by

virtue of his confirmation, but by confirmation *and survey*, under the Act of Congress of June 14, 1860.

There is, then, but *one* case where the Court has held that a simple confirmation vests the legal title in the confirmee, and that was where the decrees specifically fixed the boundaries. In all the other cases there had been an approved survey, which act was in every instance regarded by the Court as essential in establishing the legal title of the claimant.

We submit, then, that the California authorities fall far short of establishing the doctrine claimed for them by the counsel for the plaintiff in error.

On the other hand, in *Minturn* v. *Brower* (24 Cal. Rep.), and *Stevenson* v. *Bennett* (35 Cal.), the Supreme Court laid down doctrines that are wholly irreconcilable with the theory that title springs from confirmation. In these cases the Court held that a grant from the Mexican Government vested a legal title in the grantee, upon which, without presentation, he could maintain ejectment. In *Minturn* v. *Brower* (24 Cal.), the Court distinguish between inchoate and perfect titles derived from Mexico. The former require action on the part of the United States, and the Government may prescribe upon what terms it will relinquish; but the latter are titles without further legislation or governmental action. In such cases as the last, no title ever passed from Mexico to the United States, and either these cases are

not embraced in the 13th Section (compelling presentation within two years), or if that section is to be construed as providing for presentation of such titles on penalty of forfeiture, then is that provision unconstitutional and void. Such is the doctrine of the Supreme Court of California as declared in *Minturn* v. *Brower;* and this view is enforced in the opinion delivered by Judge Currey, with a power of argument and authority that is irresistible.

Now, the legal title cannot spring both from grant and from confirmation; otherwise, the title might be in two parties, the grantee and the confirmee, at the same time, which is an absurdity.

Misnomers often lead, in law especially, to grave errors, and are frequently productive of serious mischief. It was a misnomer ever to term the final action of the commission raised under the Act of 1851 a decree of any sort. Neither in its nature, nor in its effects, does it possess any of the elements of a judgment or a decree; it elicits in its enforcement neither the powers of a Court of law or a Court of equity. It is simply a report, which, if favorable to the applicant, authorizes him to apply to the Executive for a patent. Nor is the Supreme Court of the United States, *quoad* these "Land Cases," other than a part of the original commission. How often has this Court declared that in these cases they look alone to the Act of Congress, not only for their authority to deal with them at all, but for the mode and manner of dealing with them; nay, for

the very principles upon which they shall be determined? A repeal of the Act of Congress, after confirmation, and before the issuance of the patent, would deprive the confirmation of its vitality; a modification of the law might be more or less favorable to the claimant, and would certainly control what is called the "decree" of the Court. How can that be called a suit to which the United States and the claimant are parties, when one of the parties has the entire case under its own control?

That the Board of Commissioners created by the Act of 1851 was, in no sense, a judicial tribunal; that they were not vested with the machinery or functions of a Court; that they could not bring before them the necessary parties to a controversy; that, in short, no judicial power was vested in them, will hardly be denied; and, surely, the District Court and the Supreme Court, who take cognizance of this class of cases, by virtue of the same law, derive no higher or other power from that law than was thereby conferred upon the original Board: they are but appellate commissioners.

If we are correct in this view, a legal title to lands in California can be acquired only by grant from the Republic of Mexico or the United States. In this case there is no pretence of grant from the United States, and the plaintiff, if he have the legal title at all, must have derived it from Mexico. We say there is no pretense that the plaintiff has acquired a title from

the United States. We mean that there is no grant by Act of Congress, nor is there any patent. It is only claimed that the confirmation vests the legal title in Vallejo. But the patent is yet to issue: the survey, which is really a matter of judicial determination, has not yet been made. Suppose when the contest over the survey is closed, the patent that is to be issued upon it should not include the land in controversy; then, if the plaintiff should succeed in this suit, he would get our land by virtue of the confirmation, and other land by virtue of the patent. We think, when this matter is properly considered, it will be seen that confirmation is only ancillary to the relinquishment of title upon the part of the United States. The preliminary proceedings, of which the confirmation is one, are inchoate; the patent is the consummation, and the only *result* that is contemplated by the Act of 1851.

Even if it be held that the confirmation, *per se*, confers any new right upon the claimant, it can, at most, be no more than an equitable right to obtain the legal title from the Government, and, as is admitted by the plaintiff himself, ejectment cannot be maintained upon an equitable title. The question is simply this: Is it the patent or the confirmation that confers the legal title? It must be one or the other; it cannot be both; for land may be confirmed to one man, and the patent issue to another.

But admitting this so-called decree of confirm-

ation to be in its nature a judgment, how is it to be used against the defendants, who were no parties to the proceeding? As to them it is *res inter alios acta*. In short, the defendants are the third persons whose interest the 15th Section of the Act of 1851 provides shall not be affected by either a decree or a patent issued under the Act. (See *Minturn* v. *Brower*, 24 Cal. Rep., p. 668.) There are only two ways in which a judgment in one case can be used in another: the one, where it is the foundation of the subsequent suit; and the other, where it is given in evidence under the plea of "*Res adjudicata*." This decree of confirmation is, certainly, used for neither of these purposes.

The decisions of this Court upon the origin or source of title, and the mode of derivation, are neither few nor obscure.

In *Bagnell* v. *Broderick* (13 Peters, 436), the Court say:

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; *until its issuance, the fee simple is in the Government;* which, *by the patent*, passes to the grantee; and he is entitled to recover the possession in ejectment." (P. 450.)

In *Wilcox* v. *Jackson* (13 Peters, 498), it is said:

"We think it unnecessary to go into a detailed examination of the various Acts of Congress for

the purpose of showing what we consider to be true in regard to the public lands; that with the exception of a few cases, nothing but a patent passes a perfect and consummate title. * * * Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States." (P. 516.)

These cases are followed, and the same doctrine laid down, in *Fenn* v. *Holme* (21 Howard, 481), *Hooper* v. *Scheimer* (23 Howard, 235), and in many other cases.

It may be answered that these authorities are not applicable in cases of Mexican grants.

Let us examine. In the case of *Greer* v. *Mezes* (24 Howard, 268), the exact point is settled. Mezes brought his action of ejectment against Greer and others. Mezes produced a confirmed grant, survey and patent. Greer opposed to it a grant confirmed by the Board of Commissioners and by the United States District Court, with a notice by the Attorney General that no appeal to the Supreme Court would be taken. This rendered it a final decree. Touching the character of Greer's title, the Court remark:

"Although confirmed as a valid, equitable title by the District Court of California, it has never been surveyed, nor had a patent been issued for it under the decree of confirmation. *The claim of defendants to the land is therefore not yet completed into a legal title.*" (P. 274.)

"It is well settled that both plaintiff and de-

fendant must produce a *strictly legal* title, whether it be in fee or as lessee for years. The plaintiff had shown a complete legal title; the defendants had not, for the reasons already stated." (*Id.*)

Again, in *Singleton* v. *Touchard* (1 Black, 344), the Court holds:

"The plaintiff in ejectment claimed under a patent from the United States; the defendants under a claim confirmed by the District Court, on which an appeal had been entered by the Attorney General. This claim had not been surveyed; its boundaries were not officially ascertained, nor had any patent been issued for it. The Court instructed the jury, 'that in the action of ejectment the legal title must prevail; that the plaintiff had a legal title by his patent, and that the defendant's, if any, was but an inchoate and equitable title, which might avail in a Court of Chancery, but it could not avail the defendant in an action of ejectment.' The instruction was in exact accordance with numerous decisions of this Court, and justified the verdict, even if there had been error in the other instructions given."

That the legislative department also considered and treated a decree of confirmation as insufficient to vest the confirmee with title, is shown, first, by the Act of March, 1851, which provides for a patent as the consequence of confirmation, and, secondly, by the Act of June 14, 1860, which declares that the approval of the plat and survey, which are to follow confirmation, shall have the effect and validity of a patent. Why plat? Why survey? Why issue the patent at all, if the decree of confirmation effected all that the patent could by any possibility effect?

But aside from these views of confirmation in general, we propose to consider the character and effect of the particular confirmation which the plaintiff claims vested the legal title in his grantor. It appears from the transcript that Vallejo claimed by derivative title from Lazaro Peña, to whom the original grant was made. But this Court has unequivocally decided that the validity of derivative titles is not within the purview of the Act of 1851, and that, *inter sese*, opposing claimants under the original grant are in no manner affected by any decree of confirmation. In *Castro* v. *Hendricks* (23 Howard), the Court say:

"The primary object of the Act 'to ascertain and settle the private land claims in the State of California,' approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property; and for this purpose an inquiry into preëxisting titles became necessary. To accomplish this, every person claiming lands in California by virtue of any right or title derived from the Mexican Government, was required to present the same to a Board of Commissioners. The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the Board, but simply to enable the Board to determine if there was a *bona fide* claimant before it under a Mexican grant. And so, this Court have repeatedly declared that the Government had no interest in contests between persons claiming *ex post facto* the grant. (*United States* v. *Sutter*, 21 Howard, 170.) The authentic evidence of what is private property is to be found in the grants of the Government of California, and not in the mesne con-

veyances. Nor is the Government charged to decide between claimants in the condition of those interested in the rancho San Gregorio."

In these few lines there are several things worthy of note. In the first place, we learn that this proceeding was instituted by the United States for its own purposes, and that the sole object was to enable the Government to determine to what lands in California it would assert claim, and what it would abandon. For this purpose the Government invited parties having claims to present them to its agents, promising to execute quit-claim deeds to those whom its agents should recommend to its favorable consideration. These agents consisted of the Board of Commissioners, the Judge of the District Court, and the Judges of the Supreme Court of the United States. In fact, these *individuals* composed the Board—a trinity, and still but one.

Secondly, we are told that it was not the "aim" of this Act to submit to the Board the operation and validity of derivative titles. This Government, says this Court, is not "charged" to decide between such claimants. This is a mild way of putting it, but the evident meaning is, the Federal Legislature has no power to raise a special board for the determination of such questions; they must be submitted to a judicial tribunal, which this "Board" is not. We learn, then, that the derivative title of Vallejo is a claim that this board was neither intended, nor could be authorized, to pass on. And, yet, it is

the alleged determination of this Board in favor of Vallejo, upon which the plaintiff relies to maintain this action.

But when we come to the case of *The United States* v. *Vallejo* (1 Black. 283), the very confirmation upon which the plaintiff relies, we find the doctrine of *Castro* v. *Hendricks*, as to derivative titles, adopted and acted on by this Court. This claim was presented by Vallejo, claiming under an alleged mesne conveyance from Lazaro Peña, the Mexican grantee. The District Court confirmed the claim, with the following proviso:

"Provided, that this confirmation of the above land to the said M. G. Vallejo shall be without prejudice to the rights of the legal representatives of Lazaro Peña, the original grantee, or whoever may be entitled to said lands under him; and said confirmation to said Vallejo is to enure to the benefit of any person or persons who may own or be entitled to said land by any title, either at law or in equity, derived from the original grantee by deed, devise, descent or otherwise." (See printed transcript, folios 81–82.)

Here we find the Judge of the District Court, with the new light thrown upon this subject by the decision of this Court in *Castro* v. *Hendricks*, declining to pass upon the derivative title of Vallejo, and simply declaring that Peña derived a perfect title from the Mexican Government.

When this case came here upon appeal, the conduct of this Court is still more marked in this respect. Ignoring Vallejo altogether, except so far as he has shown that he was a *bona fide* claim-

ant, and therefore a proper representative or agent of the original grantee, this Court, declining to pass upon the operation or validity of the alleged mesne conveyance, simply declare, report, or, if you please, *decree*, that the title to this land vested in Peña, by grant from the Government of Mexico. This is the language of the Court:

"It is the opinion of this Court that the original claim is a good and valid claim, and that the same should be, and is hereby, confirmed."

Mark the peculiarity of this language. In the opinion no reference whatever is made to the derivative claimant. It is the validity of the original grant to Peña that is discussed; and the Court conclude by declaring, simply, that "the *original* claim (not the derivative claim of Vallejo) is a good and valid claim, and that the *same* should be, and hereby is, confirmed."

Now, if title can spring from confirmation, where does this confirmation vest the legal title to this land? The Court say the legal title to this land vested in Peña by virtue of the grant of 1840; therefore, the United States can have no claim to it. This is all that under the Act of 1851 we are authorized to determine; it is all that the Government, whose agents we are, have any interest in having determined, and we decline to go any further. Surely, if confirmation has the effect to vest title at all, this confirmation vested the legal title in Peña. At any rate, it is difficult to see how a simple adjudication

that Peña was vested with legal title by the Mexican Government, can be tortured into an adjudication, at least as against these defendants, that the legal title was in Vallejo.

But it may be said by the plaintiff, "Independently of any confirmation, we proved title in Peña, and it was admitted on the trial that Vallejo, our grantor, acquired title from Peña." Not so fast. It is true that title was shown in Peña, and it is true that it was admitted (see folio 89 of printed transcript) that Peña had "executed a deed of the tract to M. G. Vallejo, bearing date December 4, 1839." But did this conveyance convey the after acquired title? If we are to accept as law the proposition of the plaintiff's counsel, it did not. Peña, at the date of that conveyance, had, himself, no title. The grant was not made until the 13th of July, 1840, and was not approved until the 8th of October, 1845. (See folios 128, 129, of printed transcript.) Now, Vallejo conveyed to one Hoeppener, by an instrument in writing bearing date the 12th day of August, 1846, seventeen years before he conveyed to the plaintiff; and from this Hoeppener, by *mesne* conveyances, the title descended to the defendants. The plaintiff's counsel argues with great earnestness and the citation of many authorities (see his brief, p. 24,) that Vallejo only acquired title by virtue of the confirmation of 1861; that he had nothing to dispose of when he conveyed to Hoeppener; and that a conveyance under such circumstances

would, at most, carry only an equitable right to the after acquired title. Let us apply this doctrine to the conveyance from Peña to Vallejo. Peña at the date of that conveyance had acquired no title to the land in controversy, and if the conveyance operated at all upon the after acquired title, it only served to vest him with an equity which Vallejo transmitted to the plaintiff, and which is not sufficient to maintain this action of ejectment. Indeed, in his brief (p. 11), the plaintiff's counsel, arguing the invalidity of Vallejo's conveyance to Hoeppener, says: "It could not take effect as a feoffment, because Vallejo himself had no legal estate in the land, he having bought from Peña seven months before the grant was made." In fact, the whole theory upon which the action is based is, that Vallejo became invested with the legal title only by virtue of the decree of confirmation, and if we have succeeded, as we think we have, in showing that that decree had no such effect, then is this case disposed of.

The defendants plead both their possession and title derived from Vallejo. If Vallejo did not acquire the title to these premises by virtue of the conveyance to him from Peña, he has never acquired it; if he did, on the 6th day of August, 1846, he conveyed it to Andres Hoeppener, the defendants' grantor. On that day Vallejo executed to Hoeppener an instrument in the following words and figures: (See *manuscript*, not *printed* transcript, for the latter makes nothing

but an unintelligible jargon of all the Spanish documents it purports to copy.)

"El que subscribe certifica, que habiendo comprado legitimamente y formalmente al C. Lazaro Peña el terreno de la Agua Caliente, á que se refiere la ant'e aprovacion de la Assemblea Departmental de la Alta California, cedo y transpaso todos los derechos que tengo al mencionado terreno en favor de D. Andrés Hoeppener, quien hará del el uso que mas le convenga; y para los fines y usos necessarios, doy este en Sonoma, a 12 de Agosto, de 1846."

These are the exact words copied from the original, written on the back of the certificate of approval of Peña's grant, now in the archives of the office of the Surveyor General of California. We presume they are identical with the transcript in the office of the Clerk of the Supreme Court.

The proper translation of this document is as follows:

"The undersigned certifies that having purchased in due and proper form from the citizen Lazaro Peña, the rancho called Agua Caliente, to which the foregoing approval of the Departmental Assembly of Upper California refers, I grant and transfer all my right, title and interest in said rancho to Don Andres Hoeppener, to use it in any manner that to him may seem meet and proper. Given at Sonoma, this 12th day of August, 1846, for the uses and purposes herein set forth."

The translation used in the transcript is faulty, in that it is a literal rendering of each Spanish word into a corresponding English word, instead of giving the corresponding English phrase for the Spanish phrase. We declare that no more

literal translation of this document than that we have given can be made, without in some degree impairing its true meaning, and this assertion we are willing to submit to the judgment of any expert.

This document is seventeen years earlier in date than the conveyance of the same property by the same Vallejo to the plaintiff. Here is a stumbling block that must in some way be removed, and to this end the plaintiff's counsel bends all his energies. First, we are told that this document is void as a conveyance, for want of certain formalities; secondly, that it is void for uncertainty of description; thirdly, that it purports only to grant a license to occupy; fourthly, that it conveys only the interest then in Vallejo, and that he having none, none passed; fifthly, that it at best only created an equity in Hoeppener which descended to the defendants; and, sixthly, that the plaintiff is a *bona fide* purchaser in good faith, without notice, real or constructive, of the previous purchase of the defendants' grantor. We will review all these objections, although the only ground of objection made at the trial to the admission of the conveyance to Hoeppener, was that the conveyance from Vallejo to Hoeppener was a mere license to occupy. (See folio 89 of printed transcript.) This is the first point with which we propose to deal.

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It is a little curious that the words "*quien hara del el uso que mas le convenga*," which the plaintiff

construes into a license to occupy, should be, in fact, the largest words of grant that the grantor could use, and are precisely equivalent to our "to him and his heirs forever." Vallejo conveys to Hoeppener the rancho Agua Caliente, not as a tenant for years, nor with any limitations or conditions, but that he may cultivate it, graze it, sell it—in short, make any disposition of it he thinks fit. If he intended to convey what we call the fee, he could have used no words known to the civil law more apt or appropriate for the purpose. It is true that some of the more elaborate of the old Spanish forms recite, and at great length, all the various uses that the grantee may make of the thing conveyed. Vallejo condenses and includes all the specifications under the general power to dispose of it as he pleases. This is very much like American abridgement of the old common law forms of conveyance recommended by Sir Edward Coke. (See 4 Kent, 461.) These words, "as may to him seem meet and proper," are very common in English powers of attorney, and are held to be of the largest possible scope. They, or their equivalents, are found in almost all Mexican coveyances. Thus, in 7 Cal. Rep., p. 154, we find a conveyance from Feliz to Francisco de Haro, where these very words, translated, "to do with it whatever may be convenient to him," are used. Nobody pretended, in that case, that they limited the conveyance to a license to occupy. Again, in 10 Cal. Rep., p. 13, we find a document from Fer-

nandez to Noe, in which the words "*como mejor le paresco*," "as to him may seem best," occur. Also, in 18 Cal. Rep., 362, Coppinger conveys to Morena, and expresses it to be, "in order that the interested party may be safe and *may make the use that may suit him of the land herein expressed*." This conveyance was upheld by the Court as a good and valid conveyance. Many other examples might be adduced to show that this form was in universal use in California when it was intended to convey the property, as we would say, in fee.

The object in construing all contracts is to get at the meaning of the parties. When we remember that Vallejo, at the time of the execution of this conveyance, put Hoeppener in possession of the premises (see printed trans., folio 89), saw him transfer to Glein and others in the following year, lying still for 17 years without pretending any claim or title as against the grantees of Hoeppener, it is worse than idle to pretend that a mere license to occupy was intended by this conveyance.

In the case of *Mulford* v. *LeFranc* (26 Cal. Rep., 88), a case cited by counsel for plaintiff, this same claim, that the instrument upon which the action was based only created a license to occupy, was preferred. This case is worthy of note, for several reasons. The instrument as reported is as follows:

En virtud de habero presentado en este juzgado de mi cargo Don José Manuel Garcia y el

Capitan D. Geronimo H. Nye, Mejicano natur'do, sobre la engenasion que hace el prim'o al segundo del terreno que este concedio de cien varas cuadradas al E. de la laguna entre el mar y la plaza del punto de Yerba Buena, por lo que dh'o Cap'n hace uso cuando se convenga.

F. Guerrero.

Sedo: G. H. Nye.

Jose Manuel Garcia.

This is abominable Spanish; the translation given is not much better. It is as follows:

Whereas, Mr. José Manuel Garcia and Gorham H. Nye, a Mexican by naturalization, have appeared before this tribunal under my charge, in reference to the alienation of which the former makes to the latter of the land which this (functionary) granted, of one hundred varas square at the east of the laguna between the sea and the beach, at the point of Yerba Buena, by which the said Captain makes use when it may be convenient.

F. Guerrero.

I yield: G. H. Nye.

Jose Manuel Garcia.

The question was, whether this instrument conveyed the fee or whether it made Nye, who was let into possession, a tenant at will. On this point the Court say a good deal that is applicable to the case at bar. For instance (p. 106 *et seq.*):

"The alienation of the land, the transfer of the fee, was a common everyday transaction on this continent, whether in Anglo-American countries or in California, or probably in other Spanish-American countries. It is undoubtedly in this age and in these countries the most frequent

of all transactions in relation to lands. But the creation of a servitude on an estate, and for an indefinite period of time, must necessarily be a comparatively rare transaction—so rare that it is hardly conceivable that parties intending to create such an estate would use the term which ordinarily signifies, and which unlearned persons would naturally understand to signify, an absolute transfer of title, without the use of some other term clearly limiting the meaning to the particular inferior estate intended to be created. In the nature of things the occasion to use the word 'enagenacion,' to express the creation of a use 'on an estate' in lands, must have been seldom—so seldom that when so extraordinary an occasion occurred, the necessity of qualifying it by some words expressing the exact interest intended to be transferred, in order to guard against misapprehension, would almost inevitably have suggested itself. But when used in its ordinary signification—the transfer of the fee—as everybody would naturally understand it in that sense, no such necessity would exist. Nor does the fact that the parties through ignorance, inadvertence, or even design, have omitted to state whether the transfer was made for a consideration in money, or by way of barter, or was intended as a gift, militate against this construction. If it were intended to create a use, simply, the parties, whether required by some rule of law to do so or not, would be just as likely, as in the case of a sale, to state whether it was for a consideration, or intended as a gift. In our judgment the expression, or omission to express the consideration or motive of the transfer, does not aid or obstruct the mind in its efforts to solve the question of the intent of the parties.

"It is argued by the respondents' counsel that the closing words of the instrument translated in the finding, 'by which the said Captain makes

use when it may be convenient,' also by one of the witnesses, 'wherefore said Captain makes use when he sees fit;' and by another, 'wherefore said Captain makes use of it whenever it may suit him;' indicate a purpose of bestowing upon Nye only the use of the lot, and that these words thus limit and qualify the meaning of the word 'enagenacion,' already discussed. It is insisted that if Garcia had thought he was conveying to Nye the full ownership, it would not have occurred to him to add any words conferring upon Nye the right to use the property, for that, of necessity, would follow. But these, or similar words, are found in many Mexican grants, both from the Government and from individuals. They seem to be merely formal words, like the words, 'to his use and behoof,' in the ordinary conveyance in the United States. Thus, the original grant of this very lot from Alcalde Guerrero to Garcia, concludes with words of similar import, 'making use afterwards of said lot.' So, also, the original grant of Sanchez to Guerrero in the record in this suit contains a similar formal phrase: 'In order that he may possess the same legally and pacifically, and make the use that suits him.' The phrase, then, is undoubtedly a mere formal one, common in Mexican conveyances, and not intended as a limitation of the meaning of the language previously used.

"The word 'sedo,' or 'cedo'—as it is conceded by both appellants and respondents the word should be spelled—to which the signature of Garcia is appended, should manifestly be translated, 'I grant.' It is the ordinary word used in Mexican conveyance to pass title to lands. The witnesses all translate it, 'I grant,' and the same word in composition, 'consedo,' in the same instrument is rendered by the word 'granted,' in the translation adopted in the finding. But whether translated 'I yield,' or 'I

grant,' in the connection in which it stands, it must be regarded as expressing the assent of Garcia to the transfer of the land. This instrument was drawn up by the Alcalde, and expresses the object for which the parties came before the officer—that is, 'in reference to the alienation which the former (Garcia) makes to the latter (Nye) of the lands,' etc., and when it is drawn out, Garcia expresses his assent by writing his name at the bottom, after the word 'sedo,' 'I grant,' or 'I yield,' 'I resign,' 'I deliver up,' 'make over.' We are satisfied, from a careful examination of the instrument by the light of the able argument of the counsel on both sides, that the parties intended to transfer the fee. Whether the instrument was sufficient in law to effectuate that intention, as we have before remarked, it is not necessary to decide.

"But if the meaning of the language of the instrument can be considered doubtful, 'another rule of construction is, that when the words of a grant are ambiguous, the Court will call in the aid of the acts done under it, as a clue to the intention of the parties. Upon this principle we are permitted also to look at the undisturbed use of the right contested on the one side, and the unqualified acquiescence on the other, down to the time of the plaintiff's purchase of the premises in 1857.' (*French* v. *Cathcart*, 1 Comst., 102.) In this case, down to the time of the notice to quit given by plaintiff, December 2, 1861, more than twenty-one years after the execution of the instrument and entry under it. 'In the construction of grants the Court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties.' (*United States* v. *Appleton*, 1 Sum., 502.) Apply these rules to

the construction of the instrument under consideration, and every shadow of doubt as to the intent of the parties, if any there be, must be at once dispelled. The instrument was executed in 1840—twenty-four years ago. Lots of this kind could then be had almost for the asking. But a small strip of it was above the line of ordinary high tide. It is hardly to be supposed that a party would put improvements upon land thus situated, and in as little demand as such lands were at that time, when he only expected to occupy at the will of another. Still less probable is it that at a time when conveyances, even of the fee, were made with great carelessness, parties would take the trouble to go before the Alcalde and make a formal contract for one to occupy land gratuitously at the will of the other. What object could there be in such formal proceedings, since the grantee could be turned out on the next day at the will of the grantor, and the grantee's condition could be no worse without such formality? But Garcia lived till 1846, six years afterwards, and so far as anything to the contrary appears, acquiesced in the enjoyment of the estate by Nye. * * * * So long acquiescence under the circumstances of the case, upon the hypothesis that the parties only intended to convey a use to Nye, to be enjoyed without consideration, at the will of Garcia, is utterly irreconcilable with the ordinary known principles that govern human action."

It will be remembered that Vallejo, in his conveyance to Hoeppener, uses the word "cedo," "I grant," which the Court say "is the ordinary word used in Mexican conveyances *to pass title to lands.*" As to the words giving authority to Hoeppener to use the land in any manner he pleases, upon which hinges the whole argument

in support of the "license to occupy," the Court say, "that these or similar words are found in many Mexican grants, both from Government and from individuals. They seem to be merely formal words, like the words, 'to his use and behoof,' in the United States." It is noticeable, too, that the reasoning of the Court upon the long acquiescence of the grantor in the occupation and alienation by his grantee is applicable to the facts presented by our record.

But it is said that this document lacks many of the formalities required by the civil law, and hereupon we are treated to various citations, all translations from Febrero and [redacted]. Nowhere has this subject been more thoroughly discussed, or more fully considered, than in the Courts of California, and there is not a word upon the subject uttered by the plaintiff's counsel that may not be found in these reports. The truth is, we in California were, at first, all in the dark upon the subject of Mexican law, and our Courts had to grope their way to it. T
not a single *licenciado*, or professional l
the country, and the Mexican system o
ture had never been established in the department. The irregularities growing out of this state of things, is stated and commented on by the Supreme Court of California in the case of *Ryder* v. *Cohn* (37 Cal. Rep.), where the Court declare that they are driven to the alternative either of upholding, not only irregularities, but proceedings fatally defective under any system,

or upsetting titles to property of incalculable value acquired under the general belief in their legality. Of the two alternatives they prefer the former.

In *Tohler* v. *Folsom*, and in *Hoen* v. *Summons* (1 Cal. Rep.), it was held that under the Mexican system a parol contract for the sale of land was void; that such an agreement must be in writing, and that the writing must specify the names of the parties, the thing sold, the date of the transfer, and *the price paid*. This holding was affirmed in *Hayes* v. *Bona* (7 Cal.). in *Stafford* v. *Lick* (10 Cal.), and in *Stanley* v. *Green* (12 Cal.), all cited by the plaintiff's counsel. It will be observed that our document fills all these requirements except that of specifying the price paid, the lack of which the plaintiff's counsel dwells upon with peculiar unction.

But this precise question of the necessity of specifying the consideration in the written instrument came before the same Court in the cases of ~~Heirens~~ v. *Dale* (18 Cal.), and *Merle* v. *Mathews* (26 Cal.) The whole subject of conveyances in California before the institution of the State government in 1850, is so fully and ably discussed by Judge Currey, in the case of *Merle* v. *Mathews*, that we shall content ourselves with extracts from the opinion delivered in that case. The documents, the validity of which the Court was called to pass on, are in the following words:

FIRST CONVEYANCE.

I, the undersigned, having purchased the land before mentioned, and being the legal owner of said lot, this day have sold to Mr. John Paty two lots of fifty varas square, each one of said lots being east and west in the lot No. 76 on the plan of Yerba Buena, and for further testimony whereof, I sign this 28th day of May, 1844.

GUILLERMO HINCKLEY.

NATHAN SPEER.

SECOND CONVEYANCE.

I, the undersigned, having sold to Mr. John Paty what is left in my possession of the lot granted in this document, I renounce all my right to said lot, delivering this document to said Paty, and signing in presence of the Alcalde of this place.

Yerba Buena, September —, 1845.

GUILLERMO HINCKLEY.

Witness: Witness.

FRANCISCO SANCHEZ. G. H. NYE.

In the absence of the Alcalde:

ROBERT T. RIDLEY.

With respect to these conveyances the Court say:

"It is earnestly insisted on the part of the plaintiff that these instruments should be held void, because it does not appear upon their face that a just price was paid by the vendee for the premises; and it is also insisted that the omission to state therein that a price was paid for the property cannot be supplied by proof of the fact *dehors* the documents themselves; and the Partidas and Domat's Civil Law are cited in support of these positions. But these authorities do not lay down the doctrine for which they seem to

have been invoked. (Partidas 5, Tit. 5, Law 6, 1 Domat, book 3, Tit. 6, secs. 4–6.) According to the Partidas, sales and purchases might be effected in two ways, the one by writing, the other without. If the purchaser desired the contract to be reduced to writing, and that mode of evidencing the transaction was agreed upon, a sale thus made was not perfect, although the parties were agreed upon the price, until the writing was made and executed, for until then either party might retract. In the summary prefixed to Law 9, Title 5, of the Fifth Partidas, it is said that "the price shall be expressed with certainty in the sale." If this is to be understood to the effect that the price must be expressed in the writing executed, then by reference to the body of the law itself, it will be found to contain no such requirement. (*Walker* v. *Foot*, 3 Louisiana Rep., 588; *Holmes* v. *Patterson*, 5 Martin, 693; Pothier on Sales, part 1, Art. 2, Sec. 2.) In *Hayes* v. *Bona* (7 Cal., 158), the Court gave countenance to the doctrine that a contract for the sale and transfer of land under the law existing in California at the time when the conveyances from Hinckley to Paty were executed, must contain the names of the parties, the thing sold, the date of the transfer, and the price paid; and subsequently in *Stafford* v. *Lick* (10 Cal., 16), the same Court repeated the rule suggested in *Hayes* v. *Bona* as the settled law; and in *Stanley* v. *Green* (12 Cal., 166), it was held, that 'any instrument in writing which contained the names of the parties, a designation or description of the property sold, the date of the transfer and the price paid, was sufficient to pass the title.' That an instrument containing all the characteristics thus designated was sufficient as a deed of conveyance, may be and is admitted; but it does not therefore follow, that the omission of the date, or the failure to mention the price, would render a deed

designed as a conveyance, inoperative and void. Any one who comprehends the nature of a contract of sale, evidenced by writing, will readily perceive that the writing, in order to constitute the contract or evidence of the contract, must show who are the contracting parties and the subject matter transferred. These constituent parts of a written contract of sale are essential to it as a contract, and are therefore indispensable, but it is not so in respect to the mention of the date or of the price paid, as the conditions of the transfer."

In *Havens* v. *Dale* (18 Cal., 366), the Court refused to follow *Hayes* v. *Bona*, saying that they could not see anything in the point that the deed in question in that case was void by the Mexican law, because it did not recite the price or consideration.

The Court makes no reference in *Hayes* v. *Bona* to any law or authority requiring the price paid to be mentioned in the contract, unless it be to Law 29, Book 8, Title 13, of the *Recapilacion de Indias*. We have examined the law referred to, and find nothing in it requiring a written contract of sale to specify the price paid by the purchaser. This law providing for the execution of contracts in the presence of a certain officer, had relation to the public revenue. The law made it the duty of the officer in whose presence contracts were executed to furnish once a month, to another of superior grade, a copy of every contract of sale made in his presence during the preceding month, with a statement specifying the day, the month, and year when executed; the names of the vendor and vendee; a designation of the property sold or exchanged, and the price paid or the thing exchanged for it. This is the sum and substance of the requisition of this law, which comes entirely short of requiring that the

price paid should be expressed in the deed of conveyance. * * * * *

Another question touching the validity of the conveyances from Hinckley to Paty to the effect that they were not executed in the presence of a proper officer and authenticated by him, as it is maintained the law required, is suggested. Failing to appear before an *escribano*, or Notary Public, that he might witness the execution of a contract, did not, so far as we are able to learn, render the transaction void. On the contrary, contracts in writing, entered into without the presence of the officer, were held valid, as sufficiently appears by Law 1, Title 1, Liber 10, of the *Novissima Recapilacion*, which is also to be found at pages 361 and 362 of the second volume of Rodriguez's General Code of Laws, published in Mexico in 1840, entitled *Pandectas Hispano-Mejicanas*. This law relates to contracts and obligations in general, and translated, reads as follows:

"If it appear that one has undertaken to bind himself to another by promise or by contract, or in any other manner, he shall be required to peform his obligations; he shall not be allowed to object that no stipulation was made; that is, that the promise was not made with certain legal solemnities, or that the contract or obligation was made between persons absent, or that it was not made before an *escribano publico*, or that it was made by one private person in the name of others who were absent; or that one person contracted that another should do or give something, we decree, nevertheless, that all obligations and contracts so made shall be valid in whatever way it may appear that one may have bound himself to another."

Again, the Court say:

"The word 'sold,' as used in the instrument

executed by Hinckley to Paty implies, as we have said, a price or consideration paid, or contracted to be paid, for the property transferred; and after a period of more than eighteen years since these transactions, we would not be justified in presuming that such price was not just and of the value of the property at that time.

"It should be observed that the Spanish and Mexican authors to which we have referred, do not say that a contract of sale which omits to set forth the many subordinate matters mentioned, shall be void because of such omission. While certain things are of the essence of a contract, others are not; and though it is said that such subordinate things ought to appear by the contract itself when in writing, it is obvious from the whole tenor of authorities that the object of such stipulations was the protection of one or the other of the parties from consequences that otherwise might ensue to his prejudice. In these respects it is evident that these provisions of the laws were directory, merely, and that contracts were not void because of a failure to observe such directions."

With respect to the number of witnesses required, we think the plaintiff's counsel has fallen into a palpable error. Upon this point let us hear ESCRICHE, who alone of the authors cited treats of the law of Mexico as distinguished from the civil code in general. Under the head of "Instrumento," p. 396 of the Diccionario, being translated, he says:

"A private document (that is, one that is executed between the parties without the intervention of a Notary or other officer) has all the effect of a public instrument, under certain circumstances. First—As when it is afterwards

acknowledged before an officer. * * * * *
Third — Should the party to be charged be dead, or deny the execution of the document, then must it be proved by the oath of two unimpeachable witnesses of proper age, that they saw him sign it, or somebody by his direction; not that a greater number of witnesses might not be required according to the circumstances.

"Fourth—If the party charged does not plead that it is a forgery, or interpose some objection going to its validity, although he do not expressly admit it, and though no witnesses may be called to prove it, his silence will be taken as an admission. This is the opinion of Febrero, who says that he had seen it so adjudged."

A private document made and executed between the parties, without the attesting signature of the public officer, may, then, be offered in evidence. Unless the signature be denied it is presumed to be genuine; and if it be denied, it may be established by proof. Now, there was no denial of the genuineness of Vallejo's signature, nevertheless, the document was "duly proved." (See pr. Tr., fol. 88.)

Under the civil as well as the common law, a conveyance is a mere contract by which one party binds himself to deliver property to another. The contract is not executed until delivery is made. The delivery of land is necessarily symbolical, and was known in England as livery of seizin, which literally means delivery of possession. In the course of time it was held in England that the delivery of the deed, where the

grantor was in possession, was a symbolical delivery of the land, and the paper was substituted for the turf or twig. This is an invention of the English Courts. In some of the Hispano-American States, to this day, the vendor of land delivers it by taking the vendee upon the ground, in the presence of the neighbors, and putting a drawn sword into his hand, with which he drives everybody from the premises, and thus exercises a notorious dominion over them. Under the common law, then, a contract to convey is an agreement to deliver a deed. Under the civil law, what we call a conveyance is nothing but a contract of sale, which is executed, not by the delivery of the contract, but by the delivery of the thing itself. So that the right to have the land arises from the contract, which courts of justice will enforce; but the right *in* the land springs from the delivery of the land. This is a complete transfer of dominion, which needs no other act to perfect it. At common law a fee was created by livery of seizin, with or without the charter of feoffment; and so we apprehend it may be created to-day in California. (See 4 Kent, 489.) Unquestionably, it is the livery of seizin, the delivery of the possession, that passes the dominion under the civil law. When the civil law writers speak of the necessity of a writing with respect to the transfer of land, they mean, simply, that no action can be maintained upon a parol agreement to transfer the possession. But the possession having been delivered, the

dominion passes, and the livery of seizin is, as it was with our ancestors (see 4 Kent, 480), the evidence of the transfer.

In support of these views we refer to Escriche, a standard authority. He defines "venta," which we translate *sale*, as *un contrato consensual sobre la entrega de una cosa por cierto precio*—a mutual contract for the delivery of something for a fixed price. Under the same head he says: "*Si los bienes vendidos fuesen raices, es necessario para la validez del contrato, que la venta se haga en escritura publica.*" That is, if the thing sold should be real estate, to make the *contract* valid it must be in writing, before a Notary or other officer. This only goes to the effect that no action can be maintained upon a parol contract for the sale of land. Again, Escriche defines "entrega," or delivery of possession, to be, "one of the modes of acquiring or deriving property;" and he says that delivery of immovable property is made by pointing out the property or by a symbolical delivery of some instrument, symbol, or sign. See the word entrega in the Diccionario.

Under the same head Escriche says, being translated: "The contract, then, is only the right to the thing, the *jus ad rem*, that is, the right to obtain a decree against the vendor to compel him to deliver the thing itself to the vendee. It is the delivery only which gives us the right *in* the thing, the *jus in re*—that is to say, the dominion, the property, by virtue of which we may reclaim it, in whose possession soever it may be—*quia*

non pactionibus sed traditionibus ~~dominion~~ rerum dominia *transferuntur.* So that of two purchasers of the same thing, the first who has been put in possession of it acquires the property in it. although his contract may have been subsequent to that of the other party."

It was upon this authority, and others to the like effect, that the Supreme Court of California held, in *Tohler* v. *Folsom* (V. 1, Cal. Rep.), that under the civil law the delivery of the possession, without any written contract, would transfer the property. That was a case occurring in 1846, in which the plaintiff was let into possession under a verbal agreement for a deed and the payment of the purchase money, *in futuro.* But on the faith of the contract the plaintiff had made valuable improvements upon the land, as it appears that the defendants have done in this case. The purchase money was paid into Court, with a prayer for a decree compelling a conveyance. Treating the case even upon common law principles, the Court say:

"The question, therefore, in this case is, whether there has been such a part performance by the plaintiff as to put him into a situation which would be a fraud upon him unless the verbal agreement should be enforced. (Story Eq. Juris., Sec. 761.) One case put by Story (*id. ibid.*), in which specific performance ought to be decreed, is, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house upon the land, in a confidence of the due completion of the contract. In such a case, he says, there would be a manifest fraud upon the

party in permitting the vendor to escape from a due and strict fulfillment of such agreement."

Now, even if the conveyance from Vallejo to Hoeppener were void for want of formalities, which we have shown it is not, the delivery to him of the land itself, under even a parol agreement, would vest the property in him under the civil law, and would entitle him to the evidence of title under the common law.

Much is said by the plaintiff's counsel about Hoeppener having acquired a mere equity from Vallejo. To talk about an "equity" acquired under the system of the civil law, appears to us little better than a solecism. The division into common law and equitable remedies belongs entirely to the English system, and is nothing more, after all, than a classification of jurisdiction. The abstract right remains the same without regard to the particular tribunal in which it is to be prosecuted. By Vallejo's conveyance and delivery of possession to Hoeppener, the latter acquired a right to hold and maintain this property against the claim of Vallejo or his subsequent grantees. This right he could have asserted in any Mexican Court where the opposing claim could have been preferred. This right, in its full length and breadth, has been secured to him by the treaty of Guadalupe Hidalgo, which is the supreme law of the land. Can he be required, now, to go into a court of equity to perfect a right that was already perfect by the

laws under which he acquired? We think not. The right must remain intact, and any change in remedy that would substantially affect the right, would be a violation of the treaty. Had Hoeppener obtained nothing more than this document from Vallejo, he would have had only a contract of sale. Such a contract he would have been compelled to resort to the Courts of Mexico to enforce. Such a contract he might have applied to the American Courts to enforce, and it would have been no wrong or injury to him had he been required to apply to a court of equity instead of a court of law. But if you force him to resort to any court, when he would not have been compelled to such resort under the system in which the right accrued, it is a very different thing. By such means you clearly deprive him of something he had acquired, and the retention of which you have guaranteed him.

It is said that Vallejo, having no estate when he conveyed to Hoeppener, such conveyance would only have the effect to make Vallejo a trustee for Hoeppener when he obtained the title, as it is claimed he did by confirmation. But this phase of the question is not presented in this case. The defendants are not seeking to compel Vallejo to convey to them the legal title to this property; if they were, they would undoubtedly have to pursue that right in a court of equity. But it is Vallejo, or his privy in estate, who is moving against them. It is the trustee seeking to eject the *cestui que* trust. Admitting,

then, that which we deny, that Vallejo acquired the legal title by the decree of confirmation, can he, a naked trustee, even in a court of law, avail himself of it to eject those for whom he admits he holds in trust? We think no such case can be found in the books. But we have still another hold upon the plaintiff. We say that he is estopped from setting up against us this after acquired title for any purpose. In *Clark* v. *Baker* (14 Cal. Rep., p. 620), we have a very clear exposition of the character of conveyance that will work an estoppel. The then Chief Justice of that Court, now one of the Associate Justices of this Court, after stating generally that subsequently acquired estates pass only under covenants of warranty, says:

"The general doctrine thus stated is, however, subject to this qualification: that where it distinctly appears upon the face of the instrument, without the presence of the covenant or warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate, the grantor will be estopped from denying the operation of the deed according to such intent. Thus, in *Van Rensselaer* v. *Kearney* (11 How., 322), the Court after reciting several authorities, said: 'The principle deducible from these authorities seems to be that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed,

either in express terms, or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies.'"

The conveyance from Vallejo to Hoeppener comes clearly within the category of the learned Judge. Vallejo asserts that he is the owner in fee; that he has formally and legally purchased from Peña, referring for Peña's title to the approval of the Departmental Assembly, on the back of which the conveyance is written. Vallejo and his privies in estate are thus forever estopped from denying that he had title to the property when he conveyed. Upon this point Judge Kent (Com., v. 4, p. 98) says:

"The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the grantee, or his assignee, by way of estoppel, from the moment the estate comes to the grantor, and creates a perfect title as against the grantor and his heirs. The estoppel works an interest in the land. An ejectment is maintainable on a mere estoppel. If the conveyance be with general warranty, not only the subsequent title acquired by the grantor will enure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantor, under his after acquired title, is equally estopped, and the estoppel runs with the land."

If under the common law, with its distinctions

between special and general warranties, the assertion of title in the grantor carries the after acquired title, even as against a subsequent purchaser under the new title, how much more effect will be given to such an assertion under the Mexican system, that knew no such distinction. Indeed, this doctrine of estoppel was introduced into England by the Equity Courts, and was borrowed, as were most of their doctrines, from the civil law. The common law courts resisted the doctrine at first, gradually admitting its justice in cases of general warranty, and finally coming up to the equitable or civil law rule as this Court did in *Van Rensaleer* v. *Kearney* (11 Howard, 322.) In this connection it may not be amiss to refer to the California Statute passed April 16, 1850, which was in force at the time this after acquired title is supposed to have accrued. The 33d Section runs as follows:

"If any person shall convey any real estate by conveyance purporting to convey the same in fee-simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

Thus we see that the State of California, by whose laws the disposition of real estate within her limits must be controlled, has adopted the

equitable, or civil law, rule for her Courts, equally of common law and of equity.

We think we have disposed of the question based upon the proposition that the defendants have only an equitable title to answer this action of ejectment.

The plaintiff objects that the deeds under which the defendants claim from Vallejo, down, are defective in description. If upon these deeds, *alone*, the defendants were suing in ejectment, there might be something in the objection. But the grantees were all put into possession of certain and defined boundaries under these deeds, and we have only to invoke the well known law maxim, "*Id est certum quod certum reddi potest*," to answer this objection.

The plaintiff next claims that although his purchase was subsequent to the conveyance to the defendants' grantor, he was a *bona fide* purchaser, without notice of the prior conveyance, and for the supposed right thus acquired, he relies upon the California Statute concerning conveyances. The 26th Section of this Act, passed in 1850, reads as follows:

"Every conveyance of real estate within this State hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, when his own conveyance shall be first duly recorded."

Section 41 is as follows:

"All conveyances of real estate heretofore made and acknowledged, or proved, according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this Act."

The 26th section clearly does not embrace the conveyance from Vallejo to Hoeppener; in terms it is confined to conveyances made subsequently to April, 1850. It is under the 41st section that this claim must be preferred, if it is to be sustained at all. In the first place, we deny that this conveyance is within the category provided for in the 41st section. It was neither "acknowledged or proved according to the laws in force at the time of such making and acknowledgment, or proof," because there was then no law in force providing for registration at all. The fact is that after the great immigration to California in 1848 and 1849, and before the establishment of the State Government in 1850, vast amounts of property in San Francisco passed by deeds from one American to another. These deeds were variously acknowledged, sometimes before the American Judge of First Instance, sometimes before the Alcalde, and they were deposited for record sometimes in the one office, sometimes in the other. It was this class of deeds to which the 41st section of the Act concerning conveyances was intended to apply. The

first California Legislature, that of 1850, presumed that the Mexican law might have provided for acknowledgments for the purpose of registration, inasmuch as they knew that during the reign of that law, acknowledgments had been taken by the American population. They intended to put such acknowledgments upon the same footing as those prescribed by the Act that they were adopting.

That the Legislature, for public convenience, might have required the old Californians, under the penalty of forfeiture to a subsequent purchaser in good faith, to record the titles by which they held their lands, without a violation of the treaty of Guadalupe Hidalgo, may be conceded. But such an act would have been very onerous, if not unconstitutional, unless it had allowed a reasonable time within which such registration should be made.

If this Act should be construed as rendering conveyances of the class to which ours belongs void as against the subsequent purchaser, it would operate upon a subsequent purchase made ten minutes after the passage of the Act. But this forfeiture is only maintainable as the penalty for *laches* on the part of the holder. He could not register before the passage of the law, and he had no opportunity of doing so after the passage, before the forfeiture is worked. To say the least, the terms of an act must be very clear and explicit to justify a construction that would work such hardship. There is, we say, nothing in this

Act to authorize such a construction. The 26th Section declares explicitly that *future* conveyances not recorded shall be void against subsequent purchasers. Very different is the language of the 41st Section concerning *prior* conveyances. The whole object of this section is to validate, not to invalidate, the conveyances to which it refers; they are to have the same force as evidence, and to have the same force and effect as if recorded in pursuance of the Act.

We say, then, that the California statute does not purport to invalidate Hoeppener's conveyance for want of registration, and that it would be unconstitutional and void if it did.

For a further exposition of this subject, see the able and exhaustive argument of Justice Burnett, in the dissenting opinion delivered by him in the case of *Stafford* v. *Lick* (7 Cal. Rep., p. 490.)

But admitting that Hoeppener's conveyance comes within the purview of the California statute, and that that statute divests him in favor of a subsequent purchaser in good faith, the queston then arises: is the plaintiff such a purchaser? At the time he received his deed the defendants were in the actual possession and occupation of the premises in controversy. (See fol. 20, Tran.) Whilst it was always admitted that upon general principles such a possession was constructive notice to a subsequent purchaser, it was claimed that the statute of California abolished all con-

structive notices except that accruing from registration; and so it was at first held in *Messick* v. *Sunderland* (6 Cal., 149.) But in *Stafford* v. *Lick* this view of the question was greatly modified by the Judge who delivered the opinion in *Messick* v. *Sunderland*, he admitting, in this latter case, that the fact of such possession was always admissible as tending to prove actual notice; and in *Hunter* v. *Watson* (12 Cal. Rep., 375), the Court say:

"It must be conceded, however, that the authorities, not only in New York, but elsewhere, are overwhelming to the point that possession is proof of notice—whether *prima facie* or absolute, it is not necessary to inquire here—of the title of the possessor. This is the doctrine of the Supreme Court of the United States, and of every State in the Union, with three or four exceptions." * * * "We must, therefore, hold, in deference to these authorities, that the open, notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title."

And the ruling in this case has been the settled law of California ever since.

The plaintiff's counsel objects that the Circuit Judge did not find the ultimate fact that the plaintiff did have actual notice of the prior purchase. If the fact of possession be conclusive evidence of the fact of notice, as this Court has held it to be, there certainly was no necessity for his finding, as a fact, that which is a conclusion of law. If the possession be only *prima facie* evi-

dence of notice, without anything to rebut it (and there is nothing in the record), it becomes *conclusive*. At any rate, it is sufficient to uphold the judgment, in support of which all possible presumptions will be entertained by an appellate Court.

We have endeavored fully and fairly to meet and refute the manifold objections interposed by plaintiff's counsel to the affirmation of this judgment.

E. D. WHEELER,
Of Counsel for Defendants in Error.

C. T BOTTS,
Of Counsel for Defendants
Whitman and Watriss.

NO. .....

In the Supreme Court of the United States.

EMIL STEINBACH,

Plaintiff in Error,

vs.

CHAS. V. STEWART ET AL.

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

IN REPLY.

JNO. WILSON,
Of Counsel.

B. S. BROOKS,
Attorney for Plaintiff in Circuit Court.

Francis & Valentine, Printers, 517 Clay St., S. F.

IN THE

Supreme Court of the United States.

EMIL STEINBACH,
Plaintiff in Error,
vs.
CHAS. V. STEWART, ET AL.
Defendants in Error.

Argument of Plaintiff in Error, in Reply.

I.

Defendants' counsel, in his brief in answer to our opening argument, moves the Court to dismiss this writ of error, for want of jurisdiction.

The first and only notice of this motion which we have, is that contained in this brief. We do not understand that the question can be raised in this way.

But we are prepared and offer to prove *viva voce* that the value of the property in dispute, and of each several parcel, is more than five thousand dollars.

"In cases when the demand is not for money, and the nature of the action does not require the value of the things demanded to be stated in the declaration, the practice of *this Court*, and of the Courts of the United States, is to allow the value to be given in evidence."

Ex parte Bradstreet, 7 Peters, 647, 649.
Hagin *vs.* Forson, 10 Peters, 160.
United States, *vs.* Hughes, 11 Howard, 532, 559.
1 Curtis' Commentaries, Sec. 175, 192.
Beard *vs.* Federy, 3 Wallace, 494.

II.

The defendant's counsel does not dispute our position, that his client have nothing but an equity —that such equity is no defence to an action of ejectment, and that the Circuit Court erred in overruling our objection and admitting this evidence. But he says, *tu quoque*. You have only an equity and you cannot maintain this action.

We shall, with equal candor, admit that if we have but an equity we cannot maintain this action. We stand by what we said in our opening argument. "Ejectment cannot be supported or defended in the Circuit Court of the United States by an equity." When we say ejectment, we mean this suit.

And at the outset it should be understood that in the practice of the State of California, which is also the practice of the Circuit Court in common law cases, there is no such thing as an action of

ejectment. There is simply "an action to recover real property or the possession thereof." This takes the place of the actions of ejectment, writ of right, assize of novel diseizin, etc.

The material issues are plaintiff's right to the possession and the defendant's wrongful detention, (Marshall *vs.* Shafter, 32 Cal 176; Yount *vs.* Howell, 14 Cal. 405). But the right of the plaintiff must be a legal one. The action can no more be maintained upon an equitable title in the Courts of the State than it can in the Circuit Court. (O'Connell *vs.* Dougherty, 32 Cal. 458; Brown *vs.* Winter, 14 Cal. 31; Clark *vs.* Lockwood, 21 Cal. 220; Willis *vs.* Wozencraft, 22 Cal. 607; Owen *vs.* Fowler, 24 Cal. 192; Owen *vs.* Morton, 24 Cal. 3738.)

We merely *refer* to these decisions because defendant's counsel insinuates that a different rule prevails in the State and Federal Courts, which is not the case. If this were so, the decisions of our Courts would not be entitled to the same consideration on the questions raised in this case that they are.

As the common law and equity jurisdictions are vested in the same tribunals, it is permitted to the *defendant* in an action for the possession of land to set up, *by way of cross complaint*, any equity which he may have. As to this he becomes plaintiff; his complaint must contain all the essentials of a bill in equity. It is to be heard first before the trial of the legal issue. It is to be heard by the Judge alone, sitting as Chancellor. And *his decree*, when made, may dismiss the defendant's cross complaint

or enjoin the further prosecution of the plaintiff's action, and compel a conveyance of the legal title. (Meador *vs.* Parsons, 19 Cal. 294; Lestrade *vs.* Barth, 19 Cal. 660; Kadiz *vs.* Majors, 33 Cal. 288; Arguello *vs.* Edinger 10 Cal. 159; Weber *vs.* Marshall, 19 Cal. 447.) "When an equitable defence is set up to an action of ejectment, the defendant becomes an actor with respect to the matter presented by him, and his answer must contain the essential averments of a bill in equity. The defence must meet the present claim of the plaintiff to the possession, and in order that an equitable defence may avail the equity presented, must be of such a character that it may be ripened by the decree of the Court into *a legal right* to the premises, or such as will estop the plaintiff from the prosecution of the action." (Lestrade *vs.* Barth, 19 Cal. 660.)

It will be perceived, therefore, that in an action for the recovery of land in the State Courts of California, the legal title must prevail as in the Circuit Court, and I am aware of no distinction. There is no substantial difference, only this, that if defendant has an equity, he can present it by a cross bill instead of commencing a separate suit.

The proposition which our opponent contests, is this: "*The confirmation vested the legal title in M. G. Vallejo.*" He says: 1—The decisions by the Supreme Court of California do not establish this principle; and 2—If they do, it is not law in the Courts of the United States.

If it is law in the Courts of California, it is law here. The simple question is—is the proposition

sound law? If it is, the plaintiff was entitled to recover, and the defendants had no defence to this action.

But it should be understood that while a legal right is essential to a recovery in this action, it is not necessary that the plaintiff should possess a perfect and indefeasible title in fee simple. It is only necessary that the plaintiff should have, at the commencement and at the close of the action, a *legal right* to the possession of the land.

The decisions in the State of California have not been uniform. The first case that arose was Reynolds *vs.* West, 1 Cal., 322. That was an Alcalde grant, but the Court treat it as an inchoate or imperfect title, and they held in effect that ejectment could be maintained or defended on such a title. This was in 1850; but in 1852, before a new bench of Judges, the case of Leese et al. *vs.* Clark was decided. and Murray, C. J., delivering the opinion of the Court, it was decided that the action could not be maintained upon a Mexican grant. The only question which the Court seemed to have considered was whether the legal title passed by the grant of the Governor, and they held that this grant, without the approval of the Departmental Assembly, and juridicial possession, did not pass the legal title. The question does not seem to have been considered whether it did not give a legal right to the possession of the land, but they held that the holder of the grant had no standing in Court.

Wells, J., having left the State, Anderson was appointed to fill his place, and with this change

the case of Vanderslice *vs.* Hanks was decided. Heydenfeldt delivered the opinion of the Court, Anderson concurring, and it was then decided that "if it was the duty of the grantee to obtain the legislative approval, and the Governor, who had the sole power had exercised it, and made the grant, the necessity of obtaining their approval was a condition subsequent to the grant. When the land granted is described by specific boundaries, and the deed is accompanied by a diagram or plot, which it expressly mentions as descriptive, although more land is contained within the description than the quantity called for by the grant, and a judicial survey is required to be made by the grantee, the failure to make such a survey works no forfeiture; it can be made at any time. When such a grant contains a surplus the title is good for the whole lot defeasible for the surplus." Upon the return of Judge Wells a rehearing was granted in this last case, and in the opinion delivered upon the rehearing, at the January term, 1853, by Murray, C. J., Wells, J., concurring (in the judgment only), the former judgment of the Court was overruled, and the doctrine of Leese *vs.* Clark was re-affirmed. (3 Cal., 17, 27, 41, 48).

In 1854, in this Court, the case of Fremont *vs.* The United States was decided, Taney, C. J., delivering the opinion of the Court, in which it was decided that the grant "proceeds in the name of the Mexican nation to grant him the aforesaid tract, *declaring the same by that instrument to be his property in fee*, subject to the approbation of the Departmental Assembly, and the conditions annexed to

the grant. The words of the grant are positive and plain. They purport to convey to him a *present and immediate interest.*" (Fremont *vs.* the United States, 17 Howard, 557-8). The idea is repeated and enforced by illustration, and the case of Rutherford *vs.* Green's heirs (2 Wheat., 196) cited.

On the authority of this case the Supreme Court of California, in the case of Gunn *vs.* Bates (6 Cal., 268) which came before it at the July Term, 1856, reversed its former ruling, Murray, C. J., delivering the opinion of the Court, in the course of which he says:

"In Leese *vs.* Clark, (3 Cal. R.), I had occasion to examine the character of these grants, and it was there decided that a mere concession of land by the departmental Governor of California, did not convey an absolute title in fee simple; that to entitle the grantee to an indefeasible title, it was necessary that all the requirements and conditions of his grant should be complied with. Regarding the grant in that case as incomplete, and conveying but an inchoate title, we held that it was insufficient to sustain an action of ejectment *which counts on a legal title alone.* * * * * Conceding, then, for the present, that all the lands in California, except perfect titles made before the acquisition, passed to the United States, and that this State has no interest or title to the public domain (a question which is not raised in this case, and on which we express no opinion), it follows that whenever a title to land is drawn in question, it must rest for its foundation either upon

a Mexican grant, a patent from the United States, or from this State in some few excepted cases."

"If a party seeks to maintain his action on a Mexican grant, an outstanding title may be set up in the United States; but how are we to determine whether the United States have such a title as would defeat the recovery. Surely the adjudication of her own tribunals, which have been appointed to determine these questions between her and the claimants, when adverse to her interest, and the rule of construction adopted by her in relinquishing her rights, may be looked to in ascertaining the rights of the only remaining party claiming through title. The land either belonged to the United States or to the claimant under the Mexican grant. If the Federal Government accedes to the right of the grantee, not on the ground of a confirmation of prior equitable interest, but on the ground that he held a perfect title, who shall gainsay it? Certainly not a mere intruder." (P. 271-2).

So, Chief Justice Murray conceded that the holders of a Mexican grant, of an inchoate title, might maintain ejectment. Wells, J., concurred with him.

In the case of Vanderslice *vs.* Hanks, (3 Cal., 40) already referred to, the Court cite the case of Arredondo, in which this Court say: "We now consider the conditions upon which the grants were made." "There can be no doubt that they are *subsequent*; the grant is *in full property in fee*, an interest *vested* on its execution, which could only be *divested* by the breach or non-performance of

the conditions." "No time was fixed for the completion of the establishment. It is an established rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single."

Judge Heydenfeldt adds: "The very same language, with but little alteration, might be applied to this case." And he therefore held, as before stated, that the grant passed the fee to the whole, with the right of possession of the whole, until the Government surveys it and cuts off the surplus.

In Ferris vs. Coover, 10 Cal. 589, (1858), it was decided that the title to the land passed by the grant an estate vested in the grantee, subject to be defeated by the action of the Mexican Government by direct rejection, or in case of non-compliance with its conditions, by proceedings to that end. But until one or the other of these proceedings had taken place, the title continued in the grantee unimpaired The title of the grantee was in no respect impaired by the treaty of cession. Under the former Government the grantee was entitled to the possession of the land under his grant. To avoid a denouncement and a possible forfeiture of his estate, he was required to occupy and cultivate the land, and its possession was his right which could have been enforced. It was a right to the use and enjoyment of property, and as such was guaranteed by the stipulations of the treaty. It accompanied his grant, and like any other right of property may be enforced in our Courts. The action of ejectment will lie directly upon the grant

to recover the land or any portion thereof embraced within its boundaries." "If the grant contains more than the quantity granted, until the surplus is legally determined by a survey and measurement by the officers of the Government, no individual can complain. The Government alone, can determine and set apart the surplus; and until its action in the matter, the right of the grantee remains good to the possession of the entire tract within the designated boundaries."

And the Court state with great truth and force, the consequences which would result from a contrary position. "The consequences of such a position would be startling. A great portion, probably the greater portion of the lands held in this State, are claimed under grants, which are subject to a similar condition of approval by Departmental Assembly, or by the Supreme Government, and if such approval were essential to the passing of title, these lands could not be taxed, for the fee and the entire beneficial interest would be in the Federal Government, and its property we are inhibited from taxing. They could not be sold under execution; they could not pass by bargain and sale; they could not descend to the heir; nor could they be subject to administration as assets, as real estate is in certain cases under our law. It would be impossible to estimate the consequences of confusion and injury to which such a position would lead carried to its necessary and legal results." (p. 618).

This case was cited and approved in Morton *vs.* Folger, 15 Cal. 276; Seaward *vs.* Malotte, Ib. 306; Cornwall *vs.* Culver, 16 Cal. 425, and in many

other cases, and has been the law in California ever since.

In Riley *vs.* Heisch, 18 Cal. 202, the Supreme Court say: "The grant itself gave a right of possession. Indeed, it is subject to the conditions of cultivation or occupation by the Mexican regulations of 1828, which were adopted to carry into effect the general colonization law of 1824; and a compliance with those conditions was essential to avoid a possible denouncement and forfeiture of the land granted. It is of no consequence, therefore, whether the title which it created, be deemed a legal or an equitable one; for carrying with it the right of possession, it is sufficient to support ejectment."

And, in Mahoney *vs.* Van Winkle, 21 Cal. 584, Judge Norton says: "That such a grant conveys a title, upon which an action of ejectment may be maintained, for at least the quantity specified, has been several times decided by this Court, and I think must be considered as settled, so far as the question depends upon the judgments of the State Courts."

"This point being established, controls the case. If, before a judicial survey, the grantee can recover any particular portion, he can recover the whole."

The same principle was decided in Clark vs. Lockwood, (21 Cal. 220); Carpentier *vs.* Thurston, 24 Cal. 268); Thornton *vs.* Mahoney, (24 Cal. 580); Love *vs.* Shartges, (31 Cal. 494).

It will be perceived by the Court that these decisions rest upon the principle, that a Mexican grant imposes upon the grantee the duty and con-

fers upon him the right to take possession of the land. That it invests him with a legal interest in the land, coupled with the right of possession of the whole, until the Government assigns to him the specific tract to which it pleases to give him a perfect title. His title is a legal one, but it is imperfect because the Government has the right to measure it and cut off the surplus. All these decisions recognize the fact that these titles are imperfect—that they must be presented for completion—and if not presented are forfeited. And they all recognize the principle, that a Court of law can only recognize legal rights, and that to maintain ejectment, the plaintiff must have *a legal right to the possession.*

A legal right is not at all inconsistent with an equitable one. One may have a legal right to the possession, and an equitable right to a conveyance. One may have a legal right to damages for the non-performance of a contract to convey, and at the same time may have an equitable right to a specific performance upon the same contract.

It would have been disastrous indeed in California, if the holders of Mexican grants had no right to maintain ejectment to recover the possession from intruders. In all Courts, the right of the grantee was recognized as property, and subject to taxation. It would have been a gross violation of the stipulation of the treaty, if he was compelled to see his land occupied by others, and all its product absorbed by them, while he was required to pay the taxes thereon, or suffer it to be sold and bid in by these very trespassers with the money derived from the product of the land.

Nor do I see that these decisions of our Courts, which have prevailed for so many years, are inconsistent with the decisions of this Court. It would be difficult to distinguish these Mexican grants from the Grant to Arredondo, (6 Peters, 716), or the grant to General Nathaniel Green, (2 Wheat., 196.) The first condition of the grant is: "That he may *inclose* it without prejudice to the crossings, roads and servitudes, and *enjoy it freely and exclusively, making such use and cultivation of it as he may see fit, but within one year he* SHALL *build a house, and it* SHALL *be inhabited.*" (United States *vs.* Ritchie, 17 How, 536.) In the case of Fremont *vs.* The United States, (17 How, 556) this Court points out the difference between the California grants and the Louisiana and Florida concessions, showing that in these latter, "when Spain ceded the territories to the United States, it held these lands as public domain, as fully and amply as if these concessions or authorities had never been given, and the United States received the title in the same full and ample manner, neither the legal nor equitable right to them as public domain had been impaired by any act of the Spanish authority, nor had any right been conveyed to or vested in the claimants, (p. 55[e]–7), while on the other hand the California grant "proceeds in the name of the Mexican nation to grant him the aforesaid tract, *declaring the same by that instrument to be his property in fee*, subject to the approbation of the Departmental Assembly, and the conditions annexed to the grant. The words of the grant are positive and plain. They purport

to convey to him a present and immediate interest," "as between him and the Government he had a vested interest in the quantity of land mentioned in the grant. The right to so much land, to be afterward laid off by official authority in the territory described, passed from the Government to him, *by the execution of the instrument granting it.*" P. 558.) "There can be no question as to the power of the Governor of California to make the grant." (p. 557.)

"A *right and title* passed by the Governor's grant, but its definitive validity was suspended for the approval of the Assembly, and so it continued to be suspended until its approbation had been given, when the title became *definitive.*" (United States *vs.* Reading, 18 How., 7.) In the case of Arguello *vs.* The United States, (18 How., 543.) this Court again affirms the authority of the Governor to issue this instrument, and call it a "*patent,*" (543, 546) and the title conveyed by it as a "*legal title,*" (p. 544.) In other cases the Court speak of it as a "grant," and "the land granted." (United States *vs.* Cruz Cervantes, (18 How., 554. In the case of the United States *vs.* Larkin, (18 How., 561) it is called a patent, (p. 561, 562, 563, and in United States *vs.* Sutherland et al., 19 How., 365. "The *patent* to the claimant's mother *confers a title in fee,*" and throughout the opinion the document is styled a patent.

The fifth of the regulations of 21st November, 1828, is "The definitive grant asked for being made a document signed by the Governor, shall be given

to serve as a title to the party interested, wherein it must be stated that the *grant* is made in exact conformity with the provisions of the law, in virtue of which possession shall be given." (See these regulations at length, United States *vs.* Cambuston, 20 How.,62.) In Dalton vs. The United States, 22 How, 442, the claim is spoken of as "a complete record title," but there possession had been delivered. In the United States *vs.* Osio, 23 How., 287, it is spoken of as "right or title in the land." In the United States vs. Chaboya, 2 Black's R., 598, as "legal title to the land." In the case of DeHaro *vs.* The United States, (5 Wallace, 605) the whole decision turns upon the distinction between a grant like this, which conveys an interest in the land, and a mere permission to occupy. Two forged grants were in evidence in that case. The Court say, "One of them, purporting to be *a grant in fee simple* of the land to the DeHaros, signed by Governor Micheltorena, bearing date May 24, 1844, and the other purporting to be a grant of a *similar nature*, signed by the same officer, September 18, 1844." "The petition asks for the *grant* of the potrero." "They solicited a grant of the land pertaining to the potrero," but Jimeno "reported that the *grant* of it could not be safely conceded," "he recommended that they be permitted to occupy it temporarily." "There are no words used indicating an intention to give *a title* or to vary from the position taken as the informe." "To *permit* pasture ground to be occupied, excludes all idea that *a grant of the land* was contemplated." (p. 623, 624, 625.) But it is said the occupation thus

permitted could ripen into *a grant in fee*, or some lesser estate, in case the potrero was not included within the admeasurement of the *ejidos*. Not so, however, for there are in the title papers *no words granting the tract of land*, either absolutely or on condition, provisionally or otherwise, nor any words by which any estate or interest in it can be raised by implication," (p. 626.) "There is a clear distinction between the effect of a license to enter lands uncoupled, with an interest, and a grant. A *grant passes some estate of greater or less degree*, must be in writing," &c., (p. 627) and so throughout the opinion.

I am not aware of anything in the decisions of the Supreme Court that conflict with this doctrine. That the grant is imperfect, that it must be presented for confirmation under penalty of forfeiture, and that the claim for a patent is an equitable claim, the Supreme Court of California holds with this Court. And they equally agree that the grant conveys a legal estate, which confers the right to the possession of the land, which may successfully be asserted in a Court of law.

III.

I believe it to be also established that the decree of confirmation vests the legal fee in the confirmee, and in him alone; that he is entitled to the possession of the land, and that any rights which others may claim through the same source of title must be asserted in a Court of equity; and that all claims of an imperfect or inchoate character, founded

on Spanish or Mexican grants, not presented for confirmation, are extinguished.

In Estrada *vs.* Murphy, 19 Cal., 272, the plaintiff claimed his title under the same Mexican grant as the defendant, but he had failed to present his claim for confirmation to the Board of Land Commissioners, and it was held that he could not recover in ejectment. The Court there say:

"But it is said that the consequences of non-presentation prescribed by the Act of Congress cannot follow with reference to the claim of the plaintiff, inasmuch as the validity of the grant has been confirmed under a claim presented by the defendant Murphy; and that the United States have thus declared that this land is private property, and not a part of the public domain. We do not think the conclusion follows from the confirmation to Murphy. The land may be treated as private, so far as his claim is concerned, and yet be treated as public with respect to the claim of the plaintiffs. We do not understand the language of the Act as declaring that whenever a claim under a grant is not presented, the land shall be deemed absolutely a part of the public domain; but that it shall be thus treated so far as any right of the particular claimant is concerned. Other parties may have asserted successfully claims to the same land, with reference to whom it would of course be held as private property. *The confirmation under this Act operates to the benefit of the cofirmee and parties claiming under him, so far as the legal title to the premises is concerned. It establishes the legal title in the confirmee, and this must control in the*

action of ejectment. If this confirmee, in presenting his claim, acted as agent or trustee or guardian, or in any other fiduciary capacity, a Court of equity, on a proper proceeding, will compel a transfer of the legal title to the principal *cestui que trust*, ward or other party equitably entitled to the same, and subject it to the proper trusts in the confirmee's hands. It matters not whether the presentations were made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim. A Court of equity will control the legal title in his hands so as to protect the just rights of others. *But in ejectment, the legal title must control.*"

In Touchard *vs.* Crow, 20 Cal., 160, it is said: "The decree of confirmation affirmed the validity of the grant *and of the claim of the petitioners.*" And it was further decided, that a deed made before the presentation of the petition, would not pass the title, but that "intermediate conveyances made by the confirmee, or by the Sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to the alienee." (Page 161.)

In Clark *vs.* Lockwood there was simply a confirmation of an inchoate or imperfect grant. There was no survey, and of course no patent. The Court say: "The effect of the decree of the District Court thus rendered final was to establish the validity of the grant to Leese, and *of the title of the claimant* to that portion of the premises granted which he claimed in his petition. The decree was an adjudication binding upon the Government and parties

claiming under the Government, *that the title to the premises claimed was in the claimant at the presentation of his petition to the Land Commission, at which date his decree took effect by relation.*" The deed from the claimant to the plaintiff, *pending the proceedings for confirmation*, passed therefore the title thus adjudicated to the undivided fourth of the premises; and upon its introduction with the petition and final decree the plaintiff might have rested his proof as to his title." "Assuming that the defendants were shown to be within the boundaries established, the plaintiff was entitled to recover." "The decree of the United States District Court, rendered final upon the stipulation of the counsel of the government, was *absolutely conclusive* in the present action *as to the title of the confirmee.*" "No farther proof than this decree was necessary to establish the existence or genuineness of the grant to Leese, which was described in his petition, *or of any intermediate conveyances.* The confirmation inured to the benefit of the confirmee and those claiming under him, however obtained, and until set aside the decree was conclusive as to his title in this action of ejectment." (Page 222.) "The final decree of confirmation settled the question as to the effect of that conveyance, and determined that the legal title to the premises was in the confirmee. In the action of ejectment the operation of the decree cannot be questioned." (P. 225.)

So, in Rico *vs.* Spence, (21 Cal., 511,) "It does not appear from the record whether these claimants have ever presented their claims for confirmation.

If they have not done so, their claim is to be treated as non-existent, and the land, so far as they are concerned, as part of the public domain."

In Mahoney *vs.* Van Winkle, (21 Cal., 575), there had been a survey made, but not finally confirmed; but it was held that, by the decree, "the validity of the grant was settled for all time," and that the confirmee could recover all the land within the external boundaries, and that his right was not restricted to the land included within the survey. See also Carpentier vs. Thurston, 24 Cal, 268; Thornton vs. Mahoney, *ib.* 579; Minturn vs. Brower, *ib.* 637.

"Claims to land depending upon imperfect titles must be presented to the Board of Land Commissioners for confirmation, according to the provisions of the act of Congress, under the penalty, in case of failure of having the land 'held and considered as part of the public domain of the United States.' (Steinbach *vs.* Moore, 30 Cal., 507.,) cited and approved in Merle *vs.* Dixey. (31 Cal., 130.) "He must show that proceedings for the final confirmation of the title are still pending, or that it has been finally confirmed." (Vassault *vs.* Leitz, 31 Cal., 130.)

In Wilson vs. Castro (31 Cal., 458), both parties claimed under the same grant. "The title of the heirs at law being at that time inchoate, it was necessary in order to perfect it, by which the designated quantity might become transferred in fee from the Government of the United States to the parties entitled, that the case should be submitted to and passed upon by the proper authorities under

the Act of Congress of 1851. In cases of this sort, if the claim was not presented for confirmation to the Board of Commissioners within the time prescribed by the Act, the lands claimed were thereafter to be deemed, held and considered as a part of the public domain of the United States. But the failure to present the claim which had its origin in the grant to Buelna by the parties having and holding the vested interest therein did not extinguish that interest, which has ripened into a legal title by the confirmations, segregations and patents which followed from the petitions of the patentees and in the proceedings had in the cases respectively before the properly constituted authorities. The lands patented are those in the first instance intended to be granted to Buelna and the patents are founded on that grant, which operated as a concession to the grantee of an interest in the lands mentioned, which, as already said, is property which the Government of the United States, upon the acquisition of the country, became under obligations to protect, both by the law of nations and the stipulations of the treaties of Guadalupe Hidalgo. It is true that the confirmations under the Act of 1851 *must, in the first place, be held to operate to the benefit of the respective confirmees, and parties claiming under them, so far as the legal title is concerned;* but this in nowise operates to bar the parties beneficially concerned, and in justice and equity entitled to the possession and consequent enjoyment of the property, of the remedies and relief which they seek."

In the case of O'Donnell vs. Dougherty, (32

Cal., 460,) Joaquin Y. Castro, administrator, with the will annexed, of the estate of Francisco Maria Castro, his father, had obtained a confirmation to him, as such administrator, of a grant made to his father, setting forth the grant and the names of the parties interested as heirs and devisees and praying that the land "may be confirmed and granted to the parties entitled thereto as aforesaid," and the claim was confirmed. O'Donnell, claiming under one of these heirs, brought this action of ejectment against Dougherty, a squatter. The Supreme Court held that he could not recover. In their opinion, they say:

"The plaintiff deraigns title to one undivided twenty-fourth part of the premises in question, through Victor Castro, one of the heirs and devisees of Francisco Castro, and claims to recover on said title. He insists that the confirmation was in favor of all the parties in interest, because their names were stated in the petition, and because of the form of the prayer. But the grantee was no party to the petition or to the record, and the land was not confirmed in his name, but to the petitioner on the record, Joaquin Y. Castro, in whom the legal title is. The devisees named in the petition are not parties to the proceeding and are in no way bound by the averments in respect to their interest therein contained. It might ultimately turn out that those averments are not true and that the real parties beneficially interested were entirely different. The plaintiff, claiming under Victor Castro, has but an equitable estate. Joaquin Y. Castro doubtless holds the legal title as trustee for the benefit of the

devisees or heirs of said Francisco, whoever they may in fact be, and their successors in interest; but, however, this may be, *the legal title is in him as confirmee.* He was the only *party* known in the proceedings, or bound by the decree of confirmation. The Court will, in a proper action, compel the trustee to convey to the real parties in interest (Salmon vs. Symonds, and cases cited, 30 Cal., 301.) Until he does convey, actions for the recovery of the land based upon the title must be brought in his name.

See, also, Rich vs. Maples, (33 Cal., 108).

In Stevenson vs. Bennett (35 Cal., 429,) the plaintiff was the holder of a grant made by the Alcalde of the pueblo of Santa Cruz. But that pueblo failed to present its claim for confirmation. It was held that the failure of the town of Santa Cruz to present the claim for confirmation extinguished it, and that this extinguished as well the grants which had been made by the Alcalde. Consequently, the plaintiff could not recover.

The same doctrine has been uniformly held by this Court in respect to confirmations of claims under other statutes, (Strother vs. Lucas, 6 Peters 773; Swayze vs. Burke 12 Peters, 11; Strother vs. Lucas, 12 Peters, 458; Stoddara vs. Chambers, 2 How. 316; Grignon's lessee vs. Astor et. al. 2 Howard 344, Chouteau vs. Eckhart, 2 Howard 372, 375; Barry vs. Gamble, 3 Howard 54-55; Les Bois vs. Bramell, 4 How. 462; Menard's heirs vs. Massey, 8 How. 306-307; United States vs. Hughes, 11 How. 568-569; McCabe vs. Worthington, 16 How. 96; Ham vs. the State of Missouri,

18 How. 132; Willett et. al. vs. Sandford, 19 How. 81; Easton vs. Salisbury 21 How. 431; United States vs. Fossatt, 21 How. 447-449;) and the same doctrine has been held in other Courts, (Hosner vs. DeYoung, 1 Texas, 764; Norton's Succession vs. the Commissioners, etc., 2 Texas, 359; Pontalba vs. Copland, 3 La. An. 87–88; Lobdell vs. Clark, 4 La. An. 100; Purvis vs. Harmanson, 4 La. An. 422, 423, 424; Hall vs. Root, 19 Ala. 378; Sykes vs. McReory, 10 Ga. 465.

The decisions of this Court under the Act of 1851, are to the same effect.

In the case of Castro *vs.* Hendricks, (23 How. 441); this Court say:

"The primary object of the Act 'to ascertain and settle the private land claims in the State of California,' approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property; and for this purpose, an inquiry into pre-existing titles became necessary. To accomplish this, every person claiming lands in California, by virtue of any *right or title*, derived from the Spanish or Mexican Government, was required to present the same to a Board of Commissioners. The *mesne conveyances* were also required, but not for any aim of submitting their operation and validity to the Board, but simply to enable the Board to determine if there was *a bona fide claimant before it* under a Mexican grant; and so this Court have repeatedly declared that the Government had no interest in the contests between persons claiming *ex post facto* the grant. United States *vs.* Sutter, 21 How. S. C. R. 170."

"That a *confirmation* in the name of the original grantee, divesting this legal title of the United States, is binding on the Government and on the assignees, is the established doctrine of this Court. It was so held in the case of Percheman, (7 Peters, 56), which decision has been adhered to, and was recognized in Sutter's case, (21 How. 182)." "We are not aware that the survey has been executed; but when it is finally completed and a patent issued to Sutter, his assignees can assert their rights against him in the ordinary Courts of the country." (United States vs. Covilland, 1 Black. 341).

"By proceedings under this Act, imperfect rights —mere equitable claims—might be converted by the decrees of the Board or Courts, and the patent of the Government following, into legal titles; but whether *the legal title* thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either Board or Court was called upon to pass. If the claim was held subject to any trust before presentation to the Board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only *enures to the benefit of the confirmee so far as the legal title is concerned.* It establishes the legal title in him, but it does not determine the equitable relations between him and third parties." (Townsend vs. Greeley, 5 Wallace 335).

In the case of De Haro vs. United States, (5 Wallace 628), this Court, in commenting upon the character of the grant in that case, say: "Micheltorena could have lawfully ousted the De Haros from the possession at any time before their death,

because the privilege conferred, was at all times within his control and liable to be countermanded. The De Haros, so to speak, were tenants at will, and held at the sufferance of the Mexican authorities." Evidently implying that the holder under a regular grant was not a mere tenant at will—did not hold at the sufferance of the Mexican authorities, and could not have been ousted by the Governor. If such was the case, it seems absurd to say that he could be ousted by any strangers that pleased to enter upon him.

In the case of Beard vs. Federy, (3 Wallace, 489), this Court say: "The grant of Pio Pico, bearing date on the 20th of June, 1846, under which the defendants below claimed title to the greater part of the premises in controversy, was rightly excluded. With the offer of the grant, the defendants admitted that it had never been presented to the Board of Land Commissioners for confirmation and had never been confirmed. The Court treated the grant as one in colonization. All such grants, it is a matter of common knowledge with the profession in California, were made subject to the approval of the Departmental Assembly. Until such approval they were not definitively valid; and no such approval was obtained of the grant in question previous to the 7th of July following, when the jurisdiction of the Mexican authorities was displaced, and the country passed under the Government of the United States. It remained for the new Government, succeeding to the obligations of the former Government, to complete what thus remained imperfect. By the Act

of March 3d, 1851, the Government has declared the conditions under which it will discharge its political obligations to Mexican grantees. It has there required all claims to lands to be presented within two years from its date, and declared in effect, that if upon such presentation they are found by the tribunal created for their consideration, and by the Courts, on appeal, to be valid, it will recognize and confirm them, and take such action as will result in rendering them perfect titles. But it has also declared in effect by the same Act, that if the claims be not presented within the period designated, it will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned."

It would seem from these authorities that the Supreme Court of California was in entire accord with this Court, and we understand the principles established to be: 1—That the holder of a Mexican Colonization Grant, duly approved by the Departmental Assembly, has a legal title which is *definitively valid* for the quantity of land called for in the grant. 2—That this grant imposes on him the duty to take possession of the land granted, and confers upon him the right to hold and enjoy the possession and to exclude all others therefrom until an official measurement and segregation. 3—That to make the title complete and perfect and to vest the grantee with a legal estate in the land, it was necessary, under the Mexican law, that there should be a juridical possession. 4—That by the treaty, the right and duty of surveying and segregating the land devolves upon the Federal

Government, necessarily implying a preliminary inquiry into the title. 5—That all claims to land thus derived, which were not thus perfected under the Mexican Government, become absolutely extinguished unless presented for recognition, confirmation and perfection at the time and place prescribed by the sovereign. 6—That by the decree of confirmation the grant, before imperfect, or inchoate, or a mere equity, becomes a legal right established of record, subsisting in the confirmee and in him alone. 7—That by such confirmation all *legal* right in any other ceases to exist. 8—That the right of the grantee or holder of the grant to enclose, occupy, cultivate and exclusively possess, which was conferred by the original grant, continues in the confirmee after confirmation. 9—That having thus the *legal right* to the exclusive possession, he may assert it at law. 10—That no equitable interest claimed by one whose claim has not been confirmed will avail as a defense to such action.

Undoubtedly, until the issue of the patent, or its equivalent, the holder of a grant for *quantity* within exterior boundaries containing an excess still holds it after confirmation as before, subject to the right of the Government to dispose of the excess, and if, before his quantity is segregated, another grant is located and segregated, the title of the holder of the unlocated grant becomes extinguished as to that part, and he cannot complain so long as enough is left within the exterior boundaries to satisfy his claim for quantity. This doctrine was distinctly announced in the Fremont case and has

never been departed from, and it is upon this principle that the cases of Greer vs. Meyes, (24 How. 268), and Singleton vs. Touchard, (1 Black. 344) rest.

The assertion of counsel that the Supreme Court of California have not decided that by the *confirmation* alone a legal right to the possession vests *in the confirmee* upon which he may maintain ejectment is answered by the fact. In many of the cases which I have cited, the title of the plaintiff was a confirmation to him of a grant of quantity within exterior boundaries containing a surplus without survey or segregation of any kind. (Clark vs. Lockwood, 21 Cal., 220; Mahoney vs. Van Winkle, 21 Cal., 552; Cornwall vs. Culver, 16 Cal., 423; Rully vs. Heisch, 18 Cal., 198).

Indeed, if we admit the legal right of the grantee to the exclusive possession of the land, it is difficult to understand how that right can be extinguished by the simple recognition and confirmation of the title by our Government. The express reservation and exclusion of these lands by Act of Congress, from pre-emption or entry of any kind, seems rather like a declaration on the part of the Government that the possession of the grantee of the entire tract shall neither be disturbed by the Government, nor by any one else.

Lawful possession is sufficient at common law to maintain ejectment against an intruder. (Smith vs. Lorrillard, 10 John., 356; see, also, 6 T. R., 218; 9 T. R., 174; 2 T. R., 749; 1 East., 246; 2 East., 469; 15 Ves. n. 119; 2 Saund., 116; 6 Taunt. 548.

Indeed, it would seem as if the counsel admitted

the whole case when he says in his brief, at page 24, "The *confirmation* then establishes two facts: 1—That the grant was valid; and 2—That Vallejo had acquired the interest of Peña. This gave Vallejo an estate and he was in a position to convey." And, again, when he admits, on page 26 of his brief, that as an abstract proposition of law, the instrument of August 12, 1846, was not sufficient to transfer an after acquired interest.

IV.

The counsel for appellant declines to follow us in the examination of Spanish and Mexican authorities in respect to the instrument received in evidence as a conveyance from Vallejo to Hœpner, and thereby he, in effect, admits that the instrument is not sufficient as a conveyance, according to the Mexican law. But he tries to answer our argument and authorities by the bold assertion "that if the forms contended for were requisite in a conveyance under the Spanish law, there was not a solitary deed executed before the cession of California that could stand the test." We answer this bold assertion with an emphatic denial. The conveyance from Peña to Vallejo was in the exact form given by Febre, and in all the multitude of conveyances made in California, from the settlement to 1850, only four of these questionable instruments have appeared before the Courts, and those we referred to in our opening brief. If there was any such custom existing in California, under Mexican rule, the respondent's counsel well knew the impor-

tance of proving it, but he did not attempt it. He did not call a solitary witness to prove that such a custom ever existed, nor produce a book of records from any Alcalde's office, (and one existed in San Francisco where the case was tried,) to prove his assertion, San Francisco, as this Court knows, was the *cabacera of a partido.* Her Alcalde had the powers of a Judge of First Instance, and his office contained the records of the upper half of California, and a simple inspection of the records of his office would have shown what was the custom in the conveyance of land.

I do not wish to be considered as asserting that instruments like the one in evidence were unknown; on the contrary, they were known and understood, but not as conveyances. They were simple permits to occupy. It was not an uncommon thing for a man to solicit a grant of a solar in every growing town in California. They could not occupy them all, and did not intend to, and their present use was not equal in value to the cost of building the house thereon which the law required. In such case the owner willingly agreed with another to give him the use of the land in consideration of his occupying it, and for his protection gave him just such a document as this. In the case of the United States vs. DeHaro, much was sought to be made out of the word "*Titulo*," but the Court said, "The Spanish word *titulo* does not indicate the measure of the right, interest or estate of the party. It means, according to Spanish authority, the cause in virtue of which anything is possessed, and the instrument by which the right is accredited, and in

Spain and Mexico there are a class of titles (titulos) not translative of property. Therefore, Jimeno did not err in characterizing the instrument given to the DeHaros as a *titulo*, for the word *titulo* is a *nomen generalissimum*, to be applied as well to titled papers, which convey titles, in the usual acceptation of the term, as to those which confer a mere right of occupancy, and the claimant can derive no help from the use of the word 'concession,' for a distinguished Spanish scholar, (Escriche) gives this definition of it, "whatsoever is granted as *favor or reward*, as the *privileges* granted by the Prince," as a matter of form Micheltorena conceded to the DeHaros the privilege of temporarily occupying the potrero in question. There was no contract to do more, nor the semblance of one."

The words which Vallejo uses here, are *cedo y traspaso*, and which are proper in a simple license, but would be out of place in a sale or alienation, where he would naturally say *vendo y enegano*, and instead of speaking of transferring his rights, which is simply to make an Attorney, he would say *propriedad ó dominion*—the ownership *al* Señor *Hoepner y sus herederos para siempre jamas*, and we may very properly apply to it the language of this Court in the case cited (5 Wallace 627.) "We are satisfied from a careful examination of this Mexican record that the only thing conferred or intended to be conferred was a provisional or temporary license of occupation, which he [Vallejo] was willing should be in writing instead of parol to enable the licensees to enjoy their possession with greater security."

"There is a clear distintion between the effect of a license to enter lands uncoupled with an interest and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendable to heirs."

If there was anything in the writing of August 12, indicating the intention of making a *gift*, and that was followed by a formal delivery of the possession, it would, of course, be valid without an expression of a price. But there is nothing in the instrument giving any countenance to such an idea. The delivery of possession is effectual, according to the intent. If the instrument is a deed of gift or sale, the delivery of possession vests the estate. If the instrument is a license or demise at will or sufferance, then the delivery of possession vests no estate.

The counsel confounds Spanish with Mexican law. The Supreme Court do not, in Long vs. Dollahide,

24, Cal, 222, say that a conveyance of land could be made in Mexico by parol. They say "under the *Spanish* law, independent of legislation avowedly had for the purpose," etc., citing Law 6, title 5, Partida 5. That is to say, that the old Spanish law did not require the conveyance to be in writing, but later statutes did.

If there was "no doubt of Vallejo's intention," it would make a vast difference. But the intention must appear from the language of the instrument, and it must affirmatively and distinctively appear from the language of the instrument that the maker of it *intends to alienate the fee.* Here, then, is no evidence in the instrument, and none outside of it to show any such intention, while this scrupulous avoidance of every word usual and customary in expression of such an intention amounts almost to positive affirmative evidence to the contrary.

The counsel in asserting that *eighteen years passed silently by*, admits in effect that we ought to have been permitted to prove the abandonment by Hoepner, and the open public and notorious assertion of title on the part of Vallejo, before any title to Stewart or his grantors had vested. But the deed from Vallejo to John B. Frisbe, made in 1849, and placed upon the public records, was an open public assertion of title by Vallejo, and efficient to revoke the license to Hoepner.

We do not see anything further in respondent's brief requiring notice from us, except his remark, on page 34, that "the Court will presume there was sufficient evidence to justify the findings, when the contrary does not appear." It is the established

doctrine of the Supreme Court of California that the statement or bill of exceptions contains *all* the evidence material or pertinent to the *exceptions*, and it is the duty of the respondent to see that all the evidence in his favor on the point is in the bill of exceptions. The Court will *not* presume that there was evidence material to be considered other than that which appears in the record, and we submit that this is the reasonable rule. (Smith vs. Athearn, 34 Cal., 506; Hidden vs. Jordan, 28 Cal., 301.)

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